APPENDIX

Supreme Court of the United States

TERM, 1971

No. 71-5172

CHARLES O. DUKES,

Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Petition for Certiorari Filed July 27, 1971
Certiorari Granted November 9, 1971

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Order Appointing Special Attorney

The court in the above entitled Habeas Corpus Petition hereby appoints:

James A. Wade, Esq.
799 Main St.
Hartford, Conn.

as attorney for the petitioner.

Said attorney shall prepare said case for hearing as soon as possible and notify the clerk of this court in writing as soon as the case is ready for hearing.

By the Court,
LLOYD E. WEBB,
Assistant Clerk.

August 15, 1969.

No. 161335

CHARLES O. DUKES	}	SUPERIOR COURT
v.	}	HARTFORD COUNTY
WARDEN	}	OCTOBER 2, 1969

Amended Petition For Habeas Corpus

The Petitioner, acting herein by Special Public Defender alleges as follows:

1. The Petitioner is presently incarcerated in the Connecticut Correctional Institute, Somers, Connecticut.

2. The cause of his imprisonment arose as follows:

a. On May 9, 1967, the Petitioner entered a plea of not guilty in the Superior Court in and for the County

of Hartford, Johnson, J., to an information charging him in two counts with violation of the Uniform State Narcotics Drug Act, and elected to be tried by a jury of 12.

b. On May 16, 1967, the Petitioner again appeared before the Superior Court in and for the County of Hartford, Johnson, J., withdrew his plea of not guilty and entered a plea of guilty to the aforesaid information and an amendment thereto charging him with larceny in excess of $250.00 but less than $2,000.00.

c. On June 16, 1967, the Petitioner was sentenced by the Superior Court in and for the County of Hartford, Devlin, J., to the Connecticut State Prison, Somers, Connecticut, as follows:

i. On the First Count: not less than five nor more than ten years;

ii. On the Second Count: two years.

3. Prior to this Petition, the Petitioner has not filed another Habeas Corpus Petition.

4. The Petitioner now claims that his detention is illegal on the ground that his pleas of guilty were involuntary, were improvidently made and were not the product of his free and intelligent will for one or more of the following reasons:

a. The Court refused to grant the motion of the Petitioner's attorney of record to withdraw from the the case and to permit the Petitioner to proceed with other counsel of his own choosing;

b. The court refused to give the Petitioner a reasonable continuance to prepare his defense or to obtain counsel of his own choosing;

c. The Petitioner was, in fact, not permitted to obtain counsel of his own choosing after the Court had given him a 24-hour continuance.

d. At the time of his entry of his plea of guilty, the Petitioner was suffering from physical and mental disturbances which prevented him from making a free, voluntary and intelligent plea to the charges against him;

e. At the time of his entry of his pleas of guilty, the Court failed to make adequate inquiry into the voluntariness of his pleas;

f. At the time of his entry of his pleas of guilty, the Petitioner was not afforded effective representation of counsel because of a basic conflict of interest between his case and other cases represented by said counsel;

g. At the time of sentencing, the Court denied the Petitioner's request to withdraw his pleas of guilty and to obtain other counsel to represent him.

5. The convictions resulting from said pleas of guilty are violative of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article First of the Constituion of Connecticut.

Wherefore, the Petitioner prays that a writ of habeas corpus be issued to bring him before said Court that justice may be done.

Dated at Hartford, Connecticut, this 2nd day of October, 1969.

CHARLES O. DUKES,
By: JAMES A. WADE
His Attorney.

Filed October 6, 1969.

Return of Respondent

1. The respondent is the Warden of the Connecticut State Prison.

2. On May 16, 1967, the petitioner pleaded guilty to one count of Violation Of Uniform State Narcotic Drug Act and one count of Larceny.

3. On June 16, 1967, the petitioner was sentenced to the Connecticut State Prison for a term of not less than five nor more than ten years on the first count and two years on the second count.

4. Thereafter, the petitioner was duly delivered to the Warden of the Connecticut State Prison on a mittimus issued by the Superior Court for Hartford County pursuant to said sentence.

5. The respondent holds the petitioner by virtue of the foregoing proceedings.

6. A copy of the following are attached hereto:

a. Information

b. Amended information

c. Mittimus

d. Judgment

e. Transcripts dated:

(1) May 9, 1967

(2) May 16, 1967

(3) June 2, 1967

(4) June 16, 1967

By Way Of Answer To The Allegations Of The Amended Petition, The Respondent Pleads As Follows:

1. Paragraph 1 of the amended petition is admitted.

2. Paragraph 2 of the amended petition is admitted.

3. Paragraph 3 of the amended petition is admitted.

4. Paragraph 4 of the amended petition is denied.

5. Paragraph 5 of the amended petition is denied.

FREDERICK E. ADAMS, Warden
Connecticut State Prison
Respondent
By JOHN D. LABELLE
State's Attorney.

Filed October 30, 1969.

INFORMATION

In the Superior Court of the State of Connecticut, Hartford County, May Term, A.D. 1967 John D. LaBelle, State's Attorney for the County of Hartford, accuses Charles O. Dukes of Hartford, Connecticut, of Violation Of Uniform State Narcotic Drug Act, and charges that at the City of Hartford, on or about the 14th day of March, 1967, the said Charles O. Dukes did possess, have under his control, sell, or dispense narcotic drugs, to wit: heroin, an opium derivative (as defined in Section 19-244 of the General Statutes of Connecticut), in violation of Sections 19-246 and 19-265 of the 1965 Supplement to the General Statutes.

JOHN D. LaBELLE
State's Attorney

No. 28358

STATE OF CONNECTICUT

v.

CHARLES O. DUKES

CRIMINAL SESSION
SUPERIOR COURT
HARTFORD COUNTY
MAY 16, 1967

Amendment To Information

The information is herein amended by adding the following count:

Second Count

And the said Attorney further accuses the said Charles O. Dukes of Larceny, and charges that at the City of Hartford, on or about the 14th day of March, 1967, the said Charles O. Dukes stole various articles of a value in excess of Two Hundred Fifty Dollars ($250) but less than Two Thousand Dollars ($2,000), in violation of Section 53-63 of the 1965 Supplement to the General Statutes, and Section 53-65 of the General Statutes, Revision of 1958.

JOHN D. LABELLE
State's Attorney

MITTIMUS

No. 28358

To the Sheriff of the County of Hartford, His Deputy, and to the Warden of the Connecticut State Prison — *Greeting:*

Whereas, by a judgment of the Superior Court holden at Hartford within and for the County of Hartford, on the 16th day of May, 1967, Charles O. Dukes, of Hartford hereinafter referred to as the prisoner was convicted of the crime of Violation of Uniform State Narcotic Drug Act at the City of Hartford, on or about the 14th day of March, 1967 in violation of Sections 19-246 and 19-265 of the 1965 Supplement to the General Statutes as charged in first count; Larceny at the City of Hartford, on or about the 14th day of March, 1967,

in violation of Section 53-63 of the 1965 Supplement to the General Statutes, and Section 53-65 of the General Statutes, Revision of 1958, as charged in second count and was by said court on the 16th day of June, 1967 sentenced to imprisonment in the Connecticut State Prison, for the term of not less than five (5) years nor more than ten (10) years on first count and two (2) years on second count, and to stand committed in the said State Prison until said sentence be fully complied with, as appears of record; whereof execution remains to be done.

These Are Therefore By Authority Of The State Of Connecticut, to command you the Sheriff of the County of Hartford, or your deputy, that you deliver the said prisoner Charles O. Dukes to the Warden of said State Prison, or his agent, at said State Prison, and to leave with him this mittimus; and you, the same Warden of said State Prison, are likewise hereby commanded to receive the said prisoner Charles O. Dukes and him safely keep until said sentence be fully complied with or until he be discharged by due course of law.

Dated at Hartford, this 16th day of June, 1967.

By order of court
PAUL LEVINE
Assistant Clerk

JUDGMENT

STATE OF CONNECTICUT

No. 29358

STATE	SUPERIOR COURT
v.	HARTFORD COUNTY
CHARLES O. DUKES	JUNE 16, 1967

HON. RAYMOND J. DEVLIN, JUDGE

John D. LaBelle, State's Attorney for the County of Hartford accuses Charles O. Dukes of Hartford of Violation

of Uniform State Narcotic Drug Act at the City of Hartford on or about March 14, 1967 in violation of Sections 19-246 and 19-265 of the 1965 Supplement to the general statutes as charged in the information and the said attorney further accuses the said Charles O. Dukes of Larceny (value in excess of $250.00 but less than $2,000.00) at the City of Hartford on or about March 14, 1967 in Violation of Section 53-63 of the 1965 Supplement to the general statutes, and Section 53-65 of the general statutes, Revision of 1958 as charged in the second count of the amendment to information as on file will appear.

To both counts of said information on May 16, 1967 the said Charles O. Dukes pleaded and said that he was guilty.

Whereupon this court doth accordingly adjudge the said Charles O. Dukes guilty as charged in both counts of said information and that he be imprisoned in the Connecticut State Prison for not less than five (5) years and not more than ten (10) years on the first count and two (2) years on the second count.

DOMINIC A. DiCORLETO
Clerk

COURT PROCEEDINGS, MAY 9, 1967

Case No. 28358

STATE	SUPERIOR COURT
v.	HARTFORD COUNTY
CHARLES O. DUKES	MAY 9th, 1967.

BEFORE HONORABLE SIDNEY A. JOHNSON, JUDGE

John D. LaBelle, Esq.	Peter J. Zaccagnino, Jr., Esq.
For the State	For the Accused

MR. LABELLE: This is a matter for trial, Your Honor. May a jury panel of thirty-five be ordered? Counsel wishes

to discuss some matter with me, I don't know what it is, but while recess is ordered may a jury panel be called.

THE COURT: Do you want them called down immediately?

MR. LABELLE: If they get one, as soon as we get one we'll know what we are going to do.

THE COURT: Very well, panel of thirty-five may be requested. There will be a short recess.
Later:

MR. ZACCAGNINO: If it please the Court, Your Honor, on this matter that is now pending before the Court, State of Connecticut versus Charles Dukes, between last night and this morning, Your Honor, we have had a number of conversations with Mr. Dukes, and I think that I am going to petition the Court to formally withdraw from this case because there happens to be a slight conflict between my client and myself, and it's not financial, Your Honor, it is one basically that goes to the heart of my representing him, and I think, Your Honor, in fairness to the defendant, he hasn't been put to plea as yet, and this case has just been bound over three or four weeks ago, it's a very recent arrest, that in good conscience and in order for this man which is a very serious charge, Your Honor, as Your Honor knows, that I think — he tells me this morning that he wants to represent himself and he so wants to represent that to the Court, and in the recess I told him the foolishness of his ways, to try a jury case by himself.

However, I don't know what his opinion is right now, but he also tells me he may get additional counsel. I don't know what the Court's position is on that. I'm going to ask Your Honor, if Your Honor wants me to put it in writing I will, to withdraw. The defendant is here, and, Your Honor, he has

full knowledge of this and wants to represent to the Court that is so. We do have this difference that may go to the heart of my representing him.

I know Mr. LaBelle is opposing my withdrawing at this date, but as I say to the Court the man has not even been put to plea as yet and it seems to me that the motion should be granted because of the very basic position of an advocate in behalf of a defendant who he must believe in the cause in which he is speaking for in many ways and there are some things here that we have a disagreement on with respect to the matter which may in some way prejudice the defendant. I just think he should have at least — the trial should be conducted in such a manner where I don't feel as his attorney perhaps something he is doing is wrong. That is the whole issue, if Your Honor please. Not wrong with respect to the arrest, I'm not talking about that, but actually the trial, the conduct of same.

MR. LABELLE: Well, if other counsel appears, Your Honor, ready to go to trial today, I have no objection to the withdrawal. Until other counsel appears it seems to me there isn't any basis to withdraw. We are ready to try the case today.

THE COURT: Are there some preliminary motions here?

MR. ZACCAGNINO: Yes, Your Honor, there are some preliminary motions. I think I'd like to at least argue those first.

THE COURT: Do you want to argue those before he is put to plea?

MR. ZACCAGNINO: Yes, Your Honor. The clerk in the center courtroom has the motions. Do you have copies?

ASSISTANT CLERK EDWARD O'BRIEN: Yes.

MR. ZACCAGNINO: Your Honor, the first motion — do you have the motions?

MR. O'BRIEN: I have the motions, not the information.

MR. ZACCAGNINO: We are only talking about the motions right now. Would you give the Court the motions? John hasn't even filed the information yet.

The first motion I'd like to argue is the motion to dismiss or quash the information because of the fact that this man was not indicted by the Grand Jury in accordance with United States Constitution Fifth Amendment in particular and the Fourteenth. I realize, Your Honor, that the State Supreme Court has ruled that it is not necessary to indict in this State. However, Your Honor, in view of the case in Ohio and Hogan versus Molloy, Molloy versus Hogan, rather, that if the Supreme Court of the United States gets this matter they may change their opinion. I know Your Honor can't sit as an appeliate court and have to overrule this motion and I don't think argument is necessary. I know Your Honor can't grant it. However, we want the motion to stand as part of his file.

THE COURT: Do you wish to be heard on the motion to quash?

MR. LABELLE: Of course it's been decided in our State, Your Honor, in Connecticut 153451 in State versus Jones, and the United States Supreme Court has already decided it in Beck and Washington, 369 US 541, so that I see no basis for that motion.

THE COURT: The motion to quash is denied.

MR. ZACCAGNINO: If Your Honor pleases, with respect to the second motion that I have in the file, the second motion is directed at the — is a motion to suppress what was taken in the place known as 15 Barbour Street, because it is

our claim, Your Honor, this is strictly a question of law, I don't think it needs any evidence on it. The only matter we are directing it at, by error we listed five or six reasons, the only issue here is whether or not the Court had probable cause to issue the search warrant in the original instance. It's our claim on that, and Your Honor will have to peruse the search warrant, it's our claim that all the information contained therein, is based on hearsay evidence, and it's our claim, Your Honor, that if that is the situation that the search warrant itself is bad because there should be some corroborating factors other than as set out in US versus Jones. There are some cases, Your Honor, that have come down that have been — where they have found the search warrant to be good where they all contain hearsay evidence but those are particular cases in which there were other corroborating factors.

If Your Honor goes through the search warrant you will notice that it's all from an undercover agent who told them certain things, and the police claim that they saw known narcotic addicts going into this particular address. I claim all of that is based upon hearsay and the warrant itself on its face is defective, and it's our claim that in the rules set out in US versus Jones, and I don't have the citation here, I think I can get it for you before the morning is over, that the search warrant is bad in that respect alone.

MR. LABELLE: I have a photocopy of it, Your Honor, I'll give it to Your Honor now if there is no objection.

MR. ZACCAGNINO: There is no objection to the photostatic copy of the original going to Your Honor for perusal on the points which I mentioned.

MR. LABELLE: I will locate the original.

THE COURT: Well, I examined the affidavit and application and this search and seizure warrant, and it is found that

there is sufficient information in the affidavit and application to establish probable cause that the property should be seized so the motion to suppress is denied.

MR. ZACCAGNINO: Your Honor, there is a third request in the file for a bill of particulars, and if you will notice that there's only four basic questions, four things. Your Honor doesn't even have an information filed with the Court as yet so I suspect that —

THE COURT: I don't have the information.

MR. ZACCAGNINO: It hasn't been filed, I don't think. Have you filed it yet? Are you going to answer these questions or do you oppose the questions?

MR. LABELLE: If Your Honor please, the matters set forth in the bill of particulars are known to the defendant because he had a hearing in probable cause and all these matters were testified to in the hearing in probable cause transcript which was available to the defendant so that he is asking for something here which he already knows the answer to because he has had that hearing. He knows where the articles were found and he knows who had them. He knows all of the circumstances because he had the opportunity even to cross-examine the officers, so there isn't anything in this here that he is entitled to that he doesn't already know.

THE COURT: Have you seen it? Were you at the hearing?

MR. ZACCAGNINO: I had ordered it, Your Honor, and I understand from talking to my office they just delivered it to my office this morning. I haven't had a chance to look at it, but is there possession, control, sale and dispensing? I sat through the hearing in probable cause. If there is anything in Mr. LaBelle's file that shows sale or dispensing — the only

theory the State is going to have to proceed on is that he was in the same area as the drugs produced under his possession or control. He doesn't have any evidence I know of that came out of sale and dispensing. If they are alleging that in the information we are entitled to know so that we can prepare a defense for this man or he can defend himself whether or not they are actually trying to prove a sale. If they are he should have knowledge of that so he can find out the information concerning that to prepare himself a defense, I suspect.

THE COURT: Anything in the hearing on probable cause to show a sale?

MR. LABELLE: Not in the hearing and probable cause, Your Honor. However, this is the language of the statute and under the language of the statute if the sale or the dispensing can be proven we will be entitled to prove it, and with respect to the hearing in probable cause my understanding is that there was no testimony in that hearing with respect to a particular sale.

THE COURT: Well, do you intend to prove a sale, Mr. Attorney?

MR. LABELLE: Well, I don't want to be limited in my proof, Your Honor, and — may I have just a moment?

MR. ZACCAGNINO: Your Honor, in addition to that, while Mr. LaBelle is discussing this, for Your Honor's thoughts on it, under the State Constitution, the Federal Constitution, the defendant is entitled to know with particularity the specific charge against him. He knows that, but also, Your Honor, that the reason for the bill of particulars is so that it can aid him in his defense with respect to this particular charge. Now to go back to 111 Connecticut, Grasso versus Frassinelli, there is a case there, Your Honor, where

I think he was charged with something or something else, which involved really two parts of the same statute, and the Court struck that down because they said, well, you know, he's got to know specifically. I don't say this falls within this same particular case in 111 Connecticut, but it does Your Honor involve the charging with possession in effect and/or sale.

Now, Your Honor, he knows about the possession because he is fully apprised. I am prepared to go to trial on possession or control but if there is a sale involved I think he is entitled to know that to prepare his defense and get witnesses. This is one of the things which I say also, Your Honor, that is involved because of the time element involved here. He's got to know these things.

MR. LABELLE: So far as the State is concerned, Your Honor, we are prepared to prove a sale. I do not wish to disclose who the sale was made to because I have reason to believe that the witness would be tampered with. I don't want to take any risk with respect to the witness.

MR. ZACCAGNINO: I don't know how the defense can overcome a statement like that, Your Honor, but of course you can say that about any witness, but I think he probably — I am saying in his behalf he probably would have to know the date, the specific date and the place and so forth if they really are intending the sale. That is why we ask to whom. If they substitute the date, time and place —

MR. LABELLE: I'll give him the date, time and place.

MR. ZACCAGNINO: It might satisfy the defendant in his defense, Your Honor.

MR. LABELLE: I do not see any reason at this point why the person who made the purchase has to be disclosed.

THE COURT: I won't have that disclosed.

MR. ZACCAGNINO: I'm not particularly claiming that but we have to know the general area.

THE COURT: The date, time and place.

MR. LABELLE: I'll give him the date, time and place.

MR. ZACCAGNINO: Okay. If he submits that, Your Honor, I have no objection, and the rest of the things, Your Honor, we're really not — I think that they are not claiming dispensing. You're not claiming dispensing?

MR. LABELLE: Only insofar as dispensing applies to the sale, Your Honor.

MR. ZACCAGNINO: All right. If that is the limitation of it I think we've got enough on the bill of particulars to go forth.

Now the next thing is, Your Honor, that the defendant now wishes to address the Court, Your Honor, on the matter which I spoke to Your Honor about, and I would just like to say to this Court —

THE COURT: No, he hasn't been put to plea yet, Your Honor, and that is — the issue here is about my motion to withdraw, that I understand Mr. LaBelle's position is the reason for his particular position but I also understand, Your Honor, this defendant's position because it's an unusual situation, Your Honor, on a case that is so new that the same day of plea, that you go to trial. I agree Mr. LaBelle called me on Monday. He said he called me earlier, I'm sure he did. If he said he called me he must have called my office. I wasn't there. And he told me to be ready but it's an unusual circumstance when they tell me to be ready and the man hasn't pled. I took it he's got to be ready to plead on Tuesday morning. I

knew it was going to be a trial and so advised the defendant. I've been waiting to address the Court because the Court has been busy on other matters. He tells me he either wants to represent himself or get counsel outside of the county that he can have more confidence in for some reason or other. Now I don't know what the reason is but he would like to address the Court before he is put to plea so he has the right to counsel. If he is not going to have that right of other counsel to get somebody to represent himself then I think, Your Honor, whatever he wants to say I'd like to have him address the Court because if Your Honor grants my motion he'll be without counsel for the moment. Do you want to address the Court?

THE ACCUSED: Judge, Your Honor, I'd like to ask the Court —

THE COURT: I can't hear you.

THE ACCUSED: I'd like to ask the Court several questions.

THE COURT: I still can't hear you.

MR. ZACCAGNINO: Speak up.

THE ACCUSED: I'd like to ask the Court several questions to be permitted. Number one, I would like to ask for the prosecutor of this particular case to withdraw from the case because if I try the case I intend to cross-examine him concerning this case and I'm afraid it's going to cause a conflict of interest. I don't think it would be fair to the accused.

MR. LABELLE: If Your Honor please, this man is not going to run this court as long as I have anything to say to the Court about it. He knows that this case is ready to go to trial and counsel also knew this as long ago as at least a week

because his office was notified by my office on several occasions during the middle of last week, Wednesday and Thursday.

Now if this man wants to try his own case let him try his own case and let counsel sit with him and advise him if he wants to try his own case. And if he has other counsel he wants to get in place of Mr. Zaccagnino then Mr. Zaccagnino can leave but as far as the State is concerned we are ready to go to trial and this story about him going to cross-examine me in this case is news to me. I don't intend to be a witness so I don't think he's going to cross-examine me.

THE COURT: Well, we'll take that matter up if and when we try the case. What is your next point?

THE ACCUSED: Number two, Your Honor, with local counsel I am afraid, well, I know there is going to be resentment. I have reasons to believe that through conversations, and I'd like the opportunity to hire an attorney from another state that don't have no knowledge of the case, of this specific case. Otherwise I feel as though that is the reason that I intend to try my own case in the event that the Court doesn't grant it.

THE COURT: You wish to try the case yourself is that it?

THE ACCUSED: If the Court doesn't grant me opportunity to hire an attorney out of the State, sir, because I don't want no resentment upon any attorneys, local attorneys.

THE COURT: Well, at this time it's rather late to bring that in. The State says it's ready for trial. You were notified for trial so we will proceed with the trial. Whether or not I will allow counsel to withdraw is another thing.

THE ACCUSED: Yes, sir. I haven't even been put to plea on this.

THE COURT: Well, you'll be put to plea if we go forward.

THE ACCUSED: Well, that's all at the present time. Thank you.

MR. ZACCAGNINO: If Your Honor pleases, I just might like to say one thing in conclusion. I think this man has other counsel besides myself involved in another matter, and I realize that the court is being tied up, but I think in view of the seriousness of the matter, in view of my position, I was going to ask for a continuance till tomorrow morning and two things may occur.

One, it may be that my position, I might be able to convince my client of. If I can't at least he will have overnight to get counsel. I think it's not an ureasonable delay of the court because the issues involved are far more serious than any inconvenience in this instance to the court. I realize this is inconvenient. I realize Mr. LaBelle told me this but between last night and this morning a great change of position has taken place between my client and I in the matter so in view of that this is something we didn't plan to delay the court, it just came about and I know one thing being part of the case that I can't see any justification, Your Honor, for not allowing that time till tomorrow morning because it may be if it doesn't develop like I would like it to develop at least this man will have a chance to go over this case, read the transcript with me, I'll advise him, get other counsel here or do something to help him. I don't hold any plea for delay of the court. I sat here for three days waiting for the court to be open to get to this point. I've been here Tuesday, Wednesday and Thursday. I didn't do anything in my office all three days. I say to Your Honor I have been here. I don't think I have unduly delayed the court and I don't think this man has. I think we have come now to the position where Your Honor has to decide that with respect to this because I don't

feel Your Honor that I can do this man justice in this particular issue and that doesn't mean that he can't get other counsel to feel differently than I do. I think he should have at least tomorrow morning. I don't think that is too much delay. I don't see the great pressure of one day when a man hasn't been put to plea. It's the first case I have had in this court where the man has been put to trial on the same day of plea. I do think it wouldn't inconvenience the court. I feel very uneasy about the situation I am presenting to the Court, Your Honor, and I don't know that it might not resolve itself. I don't think I can resolve it but I do feel he should have this overnight. If he can't get other counsel I'll assist him in trying to get him other counsel because I don't think an man can try a case of this nature by himself.

MR. LABELLE: Of course that is a matter of the Court's discretion, Your Honor. We are prepared to go forward today and the Court might wish to consider in deciding this matter whether or not a jury if it is going to be a jury trial could be picked and testimony started tomorrow.

THE COURT: Well, I think what we will do is present him for plea, give him the opportunity, then we won't present any evidence today but we'll pick a jury today and I will hold you in attendance, counsel.

MR. ZACCAGNINO: If Your Honor pleases, is Your Honor instructing me that —

THE COURT: I'm not allowing you to withdraw at this time.

MR. ZACCAGNINO: At this time I don't know whether, Your Honor, it meets with this man's approval, because it may, Your Honor —

THE COURT: He says he wants to defend himself.

MR. ZACCAGNINO: Yes, Your Honor. I think he does want to defend himself as opposed to me representing him in the matter. I don't know. If it meets with his approval I suppose he has a right to defend himself.

THE COURT: He'll be entitled to ask questions of the jurors, of the panel, if he wishes, and then we will go to trial on the factual issues tomorrow. Would you like a short recess?

MR. ZACCAGNINO: Yes, Your Honor. Excuse me. I think it might be helpful.

(Short recess.)

Later:

THE COURT: First, do you want to present the person for plea, counsel?

MR. LABELLE: Yes. May he be put to plea, Your Honor.

THE COURT: Put him to plea and election.

MR. ZACCAGNINO: We'll waive the reading of the information.

MR. O'BRIEN: Charles O. Dukes. how old are you?

THE ACCUSED: Thirty-two years old.

MR. O'BRIEN: Charles O. Dukes, the State of Connecticut charges you with violation of the Uniform State Narcotic Drug Act. How do you plead?

THE ACCUSED: Not guilty.

MR. O'BRIEN: Do you elect a trial by Court or by jury?

THE ACCUSED: By jury of twelve.

THE COURT: Very well. Now you have a statement to make?

MR. ZACCAGNINO: Yes, if Your Honor pleases. I am going to ask the Court to continue this matter until tomorrow morning and at that time, Your Honor, give Dukes a chance to get other counsel or, as he originally told me, that he wants to represent himself. It gives him the right to either represent himself or have other counsel. In the meantime I'll have a conversation with him advising him of the difficulties so he will understand what he is faced with if he represents himself. I understand he has that right if he so desires and I have told Mr. LaBelle the case is going to go forward and he understands it. Do you understand it, Dukes?

THE ACCUSED: Yes.

MR. ZACCAGNINO: So I'd ask for tomorrow morning to have a further chance to talk with Dukes.

MR. LABELLE: May I clear up one matter on the record, Your Honor? We filed a photostatic copy of the search warrant. I understand counsel has no objection to substituting the original when it gets here.

MR. ZACCAGNINO: No, I have no objection to that, Your Honor.

MR. LABELLE: I take it — the original, I understand, was sent to Middletown by mistake, to the Circuit Court's filing office, but I will have it here tomorrow.

THE COURT: Very well.

MR. LABELLE: And then as I understand it on the motions I am to give to the answer to the motion for the bill of particulars the date, time and place of the alleged sale?

MR. ZACCAGNINO: Yes, that's right.

THE COURT: Very well. Well then it's perfectly understood by you, Mr. Dukes, that you will proceed to trial tomorrow morning?

THE ACCUSED: Yes, sir.

THE COURT: Very well. Then we'll continue the case till tomorrow morning and tomorrow morning will the clerk see to it that we have a panel.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Now then we will have a short recess.

COURT PROCEEDINGS, MAY 16, 1967

CASE NO. 28358

STATE	SUPERIOR COURT
v.	HARTFORD COUNTY
CHARLES O. DUKES	MAY 16, 1967

BEFORE HONORABLE SIDNEY A. JOHNSON, JUDGE

JOHN D. LABELLE, ESQ.	ROBERT C. DELANEY, ESQ.
For The State	For the Accused

MR. LABELLE: I have been informed that there has been a request to change his plea to the information on file. At the time of the bindover, Your Honor, in this case, there was another count which was not put in the original information because it was a separate offense. Counsel at that time had agreed that that count would be held in abeyance until such time as this count in the original information was disposed of. In view of the request to change a plea here I

would like to file an amendment to the information, Your Honor, to add the second count back to it so that the information will be the original count plus this second count.

THE COURT: Is that understood?

MR. DELANEY: That is understood, Your Honor. We agree with that.

THE COURT: Very well. Permission is so granted. Then I understand Mr. Dukes is going to change his plea, is that it?

MR. LABELLE: Yes, Your Honor, and I would like to ask if inquiry would be made as to change of plea and that he be put to plea on both the original information again and this amendment also. Excuse me, Your Honor. The record also ought to appear that Mr. Delaney is here with him today and he is in the office of Mr. Zaccagnino. I think the Court might inquire with respect to the representation since there had been some indication that counsel had asked to withdraw the other day.

THE COURT: Well now, Mr. Dukes, I want to be sure that everything is in order here. I was present the other day, of course, when you were presented and the problem came up about an attorney. Now I want, now Mr. Delaney is here, are you fully satisfied with the services he is rendering you, Mr. Dukes?

THE ACCUSED: Yes, sir.

THE COURT: You are. And now you know of course, Mr. Dukes, that — you know of course that the State of Connecticut has the burden of proving you guilty on the charge and you are free to go to trial but you still wish to change your plea, is that correct?

THE ACCUSED: Yes, sir.

THE COURT: And do you do this of your own free will, Mr. Dukes?

THE ACCUSED: Yes, sir.

THE COURT: And you know the probable consequences of it?

THE ACCUSED: Yes, sir.

THE COURT: Very well, and no one has induced you to do this, influenced you one way or the other? You are doing this of your own free will?

THE ACCUSED: Yes.

THE COURT: Very well then. We will accept the change of plea.

ASSISTANT CLERK JOEL ELLIS: Mr. Dukes, how old are you?

THE ACCUSED: Thirty-two years old.

MR. ELLIS: Do you waive reading of the information?

MR. DELANEY: We will waive the reading.

MR. ELLIS: To the charge of violation of Uniform State Narcotic Drug Act what is your plea?

MR. DUKES: Guilty, sir.

MR. LABELLE: May we have the plea to the amendment also?

MR. ELLIS: Do you waive reading of the amended —

MR. DELANEY: Waive reading of the amended information.

MR. ELLIS: In the amended information you are charged in the second count with larceny. What is your plea to that count?

THE ACCUSED: Guilty, sir.

THE COURT: Both pleas are accepted.

MR. LABELLE: May these matters be referred to the probation department for pre-sentence report, Your Honor.

THE COURT: June 2nd.

MR. LABELLE: And may they be assigned disposition?

THE COURT: They've got quite a few, I understand, for the 26th.

MR. LABELLE: May it be June 2nd.

THE COURT: June 2nd, and continued under the same bond.

MR. LABELLE: The bond in the case is twenty thousand dollars.

THE COURT: Very well. Pre-sentence investigation is ordered, sentencing for June 2nd on the same bond.

MR. DELANEY: Thank you, Your Honor.

COURT PROCEEDINGS, JUNE 2, 1967

No. 28356

STATE	SUPERIOR COURT
V.	HARTFORD COUNTY
CHARLES DUKES	JUNE 2, 1967

BEFORE HONORABLE RAYMOND J. DEVLIN, JUDGE

GEORGE A. SILVESTER, ESQ.
FOR THE STATE

PETER J. ZACCAGNINO, ESQ.
FOR THE ACCUSED

MR. ZACCAGNINO: If Your Honor pleases, this was set down in the other courtroom before Judge Johnson this morning, and Mr. Capshaw is still working on the report, and they tell me, I find through Dukes they need another two weeks in which to finish it. Mr. LaBelle asked me to have the case called here because Judge Johnson is handling divorce matters.

I would also say that all the matters we have asked for consolidation haven't come in, so we'd need a continuance for that purpose anyway.

MR. SILVESTER: June 16th, if Your Honor pleases, under the same bond?

THE COURT: June 16th. Same bond.

MR. ZACCAGNINO: Thank you, Your Honor.

COURT PROCEEDINGS, JUNE 16, 1967

No. 28358

STATE	SUPERIOR COURT
V.	HARTFORD COUNTY
CHARLES DUKES	JUNE 16, 1967

BEFORE HONORABLE RAYMOND J. DEVLIN, JUDGE

JOHN D. LABELLE, ESQ.
ATTORNEY FOR THE STATE

PETER ZACCAGNINO, ESQ.
ATTORNEY FOR THE ACCUSED

MR. LABELLE: 28358, Charles Dukes.

MR. ZACCAGNINO: If Your Honor please, prior to this man being sentenced in this particular matter, I discussed this momentarily with Mr. LaBelle. Mr. Dukes has advised me that he has other counsel from New Haven: Mr. Fazzano, who is representing him, and I don't intend in any way to delay the Court. I thought, if he has other counsel, I have no no objection to getting out. In fact, I do not want to represent Dukes if he doesn't have any confidence in me. But Fazzano was tied up, Attorney Fazzano was tied up this morning and is requesting a continuance for a week, and I told Mr. Dukes the most I would do for him would be to put the motion to the Court and suggest it be continued until Tuesday. I think this, Your Honor, that if he has other counsel and because of the serious nature of the charges, that he should have counsel of his own choosing. If he has no confidence in me, I don't resent it personally. I understand his position. But I do feel that this is a very serious situation, and Mr. LaBelle wants to proceed this morning with sentencing. I don't quarrel with Mr. Labelle on that point. I want to state my position to the Court so that Your Honor will know what his position is. He told me this morning that he felt that he didn't have confidence in my

handling the matter and he wanted Mr. Fazzano to come in. If that is the situation, Your Honor, as I say, I don't have any personal feeling on it, but I suppose there can be no — you know, I can't represent a man that — or if he doesn't have confidence in me is what I want to say. If he feels he wants Attorney Fazzano, I would like to state to the Court I have no objection; and as a matter of fact, I welcome it. I don't want to be dilatory because this man comes up this morning and he tells me he has another lawyer, but I feel it is so serious I don't know what to tell Your Honor except to tell Your Honor that I should be relieved as counsel when Mr. Fazzano —

THE COURT: What could other counsel do that you couldn't do?

MR. ZACCAGNINO: I don't know. Your Honor; but I do say this: That it's become a situation, Your Honor, that I can't quite understand either, and he feels, and I stated his position to Your Honor, so that Your Honor knows. And if he has anything he wants to say to Your Honor, I suppose he ought to say it to you. I have said what I have got to say.

THE COURT: What do you want to say, Dukes?

THE ACCUSED: Well, I was —

THE COURT: I can't hear you. Speak up.

THE ACCUSED: I was most interested in justice in this case, and I spoke to maybe about twenty attorneys from Hartford, and nobody seemed to want to take the case, represent me, and it would be more justice to get more justice by hiring an attorney out of town, which I brought this out before for certain reasons.

THE COURT: Well, you have a good attorney now. What is the objection to that?

THE ACCUSED: Well, I would rather have an attorney out of town for certain reasons of the case. Your Honor, sir —

THE COURT: Well, I think we ought to go on with it today.

MR. LABELLE: There has been no appearance.

THE COURT: No appearance been filed.

MR. LABELLE: It is my understanding from Mr. Fazzano, who called my office this morning, called one of the detectives, that he was just contacted last night. He doesn't know Dukes or anything about the cases. Now, no appearance has been entered. It is simply a disposition. It isn't a trial, and I don't see there is any reason for delaying if further. He's had plenty of opportunity when he was put to plea in this matter, and the court specifically asked him before he accepted the plea whether or not he was satisfied with his counsel. And at that time the plea was accepted, he indicated to the court that he was. I ask that the sentence be imposed in 28358.

THE COURT: The sentence will be imposed.

MR. LABELLE: This matter, there is two counts in this information. One is, the first count is a violation of the Narcotics Act, 19-265; and the second count is larceny or receiving stolen goods.

Before he is sentenced, Your Honor, he'd been asked to take some cases from Fairfield County and some other counties, I understand now that he does not want to consolidate those cases, so that as long as that is clear in the record.

THE COURT: There are other cases from other counties?

MR. LABELLE: There were some cases from other counties, and I understand he doesn't want to consolidate them now.

MR. ZACCAGNINO: If Your Honor please, he wishes to address the Court, and he told me the purpose of it. I would rather have him address the Court on this matter rather than me, if Your Honor pleases.

THE COURT: You mean with respect to the other counts in other counties?

MR. ZACCAGNINO: This particular count pending before Your Honor.

THE COURT: I will give him a chance to talk.

MR. ZACCAGNINO: He tells me now, Your Honor, he would like to change his plea, and I thought Your Honor would like to know that. I don't suggest that to the Court. He suggests it, and that is the reason he hired new counsel, and this comes as a surprise to me. This is the first I heard of it, but I had a suspicion, Your Honor, that this may take place because of the problem when he entered the plea. I was maybe a little forceful. However, Your Honor, it was all discussed with him, and he does feel, Your Honor, that the reason he went out of the county was because no lawyer would properly represent him in this matter in this county. I don't believe that, because I put a lot of hours in this case. However, he does tell Your Honor now that he does want to change his plea, and he better say it himself, because Your Honor better talk to him about it.

THE COURT: What do you want to say?

THE ACCUSED: Yes, sir; I would like to change my plea, Your Honor. At the time I pleaded, I just came out of the hospital, I think it was a day, and I was unconscious for

three days, and I didn't realize at the time actually what I was pleading to. And since then, I am a patient, taking a mental examination at the Hartford Institute of Living and also Dr. Harold, a heart specialist, and she said that, the psychiatrist said that I needed psychiatry treatments.

THE COURT: I will deny the motion.

MR. LABELLE: Your Honor has his record here, and I would simply say he's, so far as I am aware of, been involved in criminal activities in this county for a substantial period of time; and on the case, I would suggest by way of disposition on the first count not less than five no more than ten years in the State's Prison. On the second count, two years, making an effective sentence of not less than five no more than twelve years.

THE COURT: All right.

MR. ZACCAGNINO: Your honor, it puts me at a slight disadvantage, but I will tell this to the Court: That at the time that he changed his plea, Your Honor, that some of these cases, Your Honor, were very tenuous at best, and it is my understanding that all of the matters were going to be disposed of on the same basis, consecutive or concurrent sentences would be imposed. I think this, Your Honor, that to sentence this man on one of these counts and for all of them, the reason I induced him, I didn't induce him, I discussed with him his best possible interest to change his plea because he had so many matters pending. Now, preceeding on two matters, and all these matters are pending, I feel that if Your Honor does accept the recommendations, which is the five to ten on the sentence, the minimum or the maximum on the narcotics case, he will have great additional time, and I don't know what to tell Your Honor other than the fact I wish Your Honor would make a note for the record, in the event I can talk to Dukes, that Your Honor does have

knowledge of these other situations, these other crimes which are of a similar nature and of a weaker nature, and I would say to Your Honor the only thing in defense of Dukes, I realize his record is bad and his activities have been bad; however, when he changed his plea and entered his plea of guilty, he saved the State considerable amount of cost and expense and time, because I think about five or six cases pending against him, they only had one or two cases that were of a strong nature, and I do think, Your Honor, that I feel having been his counsel, that I should make this fact known to Your Honor that it was a matter that Your Honor would normally, under normal circumstances, in a situation like this, enter concurrent sentences, if, in fact, it was so recommended by the State's Attorney; but since he doesn't want to plea to these other matters, I would like to make that note for the record, because I feel at some later date he may have to come back to this court and see Your Honor or see another judge on these other matters now pending before it.

THE COURT: What do you want to say, Dukes?

THE ACCUSED: I am rather flabbergasted really, because I didn't expect this this morning. It just puzzles me. I am not guilty of the charges. I am not guilty.

THE COURT: There are matters in this probation report that are very illuminating: this man driving around in very expensive cars, being hospitalized on a couple of occasions, the Welfare Department picking up a bill for seventeen hundred and ninety-four on one occasion, twenty-four hundred and five dollars on another, it doesn't smell too good.

On the first count, the sentence will be not less than five no more than ten State's Prison. The second count, the sentence will be two years.

Memorandum of Decision in Habeas Corpus

The petioner for a writ of Habeas Corpus bases his action on: (1) that a plea of guilty is subject to reveiw on Habeas Corpus to determine its voluntariness; (2) that his plea of guilty was involuntary, because of ineffective assistance of counsel; (3) that his plea of guilty was involuntary because of inadequate time to obtain counsel of his own choosing or to prepare his defense; (4) that his plea was involuntary because of physical and mental disturbances at the time of plea; and (5) that the Court did not establish the voluntariness thereof. This petitioner's case has been before the Supreme Court of Connecticut, *State of Conn.* v. *Dukes,* 157 Conn. 498, and to some extent the issues raised herein have been answered adversely to his present claims.

The last issue that the Court did not determine the voluntariness of the plea has been determined in *State* v. *Dukes,* supra 506 where the court held ". . . we find no error in the rulings of the Court or in the exercise of the discretion with which it is vested." Prior to that quoted statement the Court had gone at length into the same facts presented at the hearing on this petition and held the inquiry adequate. The petitioner does present a new factor, i.e., his health, physical and mental, at the time of the plea. His present testimony of his physical and mental well-being is less than credible. His answers to the court's questions at that time, his present complete restatement of his ten minute discussion with Attorney Delaney, his own statement that he answered the court's questions about which Attorney Delaney cautioned him, do not indicate physical or mental incompetence. The petitioner relies to a great extent on *Boykin* v. *Alabama,* 23 L. Ed. 2d 274 for the requirement of court ascertainment of a plea of guilty. In that case the court made no inquiry of the defendant on a plea of guilty and thereafter the defendant received the death penalty for the crimes of common law

robbery. No evidence has been demonstrated to this court that the guilty plea was accepted without an affirmative showing that is was intelligently and voluntarily made. *Boykin,* v. *Alabama,* supra 279. It is interesting to note that on that date, in answer to specific inquiry by the court he indicated his satisfaction with the attorney then representing him.

The petitioner next raises the issue that his counsel had a conflict of interest that prevented his effective assistance of the plaintiff. On June 2, 1967 two defendants in another case, Andrea Sejerman and Sandra Baker, were also represented by the plaintiff's counsel on a charge of conspiracy to obtain money by false pretense before the same judge who sentenced the plaintiff. On that date counsel stated that the two women had been led astray by the plaintiff and that their cooperation led to the plaintiff's plea of guilty and his subsequent removal from society. The plaintiff was sentenced two weeks later. Significant on this issue are the facts that the plaintiff knew that his counsel represented the two women in their case which was a year older than the one from which he instituted his habeas corpus petition; that the women and the plaintiff were not co-defendants herein; and that he did not raise the point in his claim for a new attorney. He cannot complain of conflicting interests, if in fact they were conflicting, with his knowledge of both representations of counsel. 23 CJS Criminal Law, Section 982(9); *People* v. *Stock,* 23 Ill. 2d 35, 177 N.E. 2d 98. The plaintiff cites *Glasser* v. *United States,* 315 U.S. 60, 70; *Campbell* v. *United States,* 352 F. 2d 359, 360; *Lollar* v. *United States,* 376 F. 2d 243; *Sawyer* v. *Brough,* 358 F. 2d 70, 73 and *People* v. *Chacon,* 73 Cal. Rept. 10, 447 P. 2d 106 all of which involve co-defendants which was not the case here.

The petitioner further raises the issue that his plea was involuntary since he did not have adequate time to obtain counsel of his own choosing or to prepare his defense. The

petitioner never made known his desire for new counsel until the morning he was to be sentenced, even to counsel then representing him. New counsel was not present in court on that day and in fact did not appear until about one week after he was sentenced. He showed a lack of diligence and a lack of good faith with the court in doing nothing about new counsel from May 16, 1967 the date of plea to June 16, 1967 the date of sentencing, or from June 2, 1967 when Sejerman and Baker were sentenced. It was within the court's discretion to grant or deny a continuance for new counsel, 66 ALR 2d 298. See *United States* v. *Yager,* 220 F. 2d 795 cert. denied 394 U.S. 963; *People* v. *Adame,* 169 Cal. App. 2d 587, 337 P. 2d 477. Again reference is made to the Supreme Court's statement in *State* v. *Dukes* supra 506 that there was no abuse of discretion by the court.

The last issue raised is that the physical and mental disturbances at the time of plea rendered it involuntary. This matter has been previously covered by the court's ruling that the plaintiff's evidence of his physical and mental health is not worthy of belief. Since there was no evidence besides his own testimony on this issue the court is left with no evidence upon which to base a finding and ruling. In addition the hospital record indicates that he was responding fairly well and was completely oriented on May 12, 1967.

The issue has been discussed by both parties as to whether on a plea of guilty, habeas corpus lies to determine the voluntariness thereof, particularly in view of the ruling that such a plea waives all defenses other than that the indictment charges no offense and waives as well the right to trial, the incidents thereof and the constitutional guarantees with respect to the conduct of criminal prosecutions. *Brisson* v. *Warden,* 25 Conn. Supp. 202. While the facts of the crime may not be examined, the facts attendant upon the entry of the plea of guilty may be inquired into on habeas corpus. *Doran* v. *Wilson,* 369 F. 2d 505, 507; *Commonwealth ex rel*

West v. *Myers,* 423 Pa. 1 222 A. 2d 918, 921. *Machibroda* v. *United States,* 368 U.S. 487, 493; *Trotter* v. *United States* 359 F. 2d 419; *United States ex rel Siebold* v. *Reincke,* 362 F. 2d 592, 593. All of the cited cases have to do with coerced pleas and pleas obtained as the result of tainted confessions which is not the case here. However it is clear that the circumstance surrounding the plea of guilty may be the subject of habeas corpus.

For the reasons stated herein the petition is denied.

LEVINE, J.

January 15, 1970.

JUDGMENT IN HABEAS CORPUS

STATE OF CONNECTICUT

No.161335
CHARLES O. DUKES of the
Town of Somers
County of Tolland
State of Connecticut
V.
WARDEN
CONNECTICUT STATE PRISON

SUPERIOR COURT
COUNTY OF HARTFORD
AT HARTFORD
JANUARY 15, 1970

PRESENT HON. IRVING LEVINE, JUDGE

JUDGMENT

This petition for writ of habeas corpus dated July 1, 1969 as amended on October 6, 1969 claiming that the petitioner was confined in Connecticut State Prison without law or right came to this Court on July 14, 1969, and thence to the present time, when the parties appeared and were at issue to the Court, as on file.

The Court, having heard the parties, finds the issues for the defendant.

Whereupon it is adjudged that the petition be and hereby is dismissed.

By the Court,
PATRICIA FRIEDLE,
Assistant Clerk.

FINDING ON HABEAS CORPUS APPEAL

First: The following facts are found:

1. The petitioner was arrested in Hartford in March 1967, and charged with a violation of the Uniform State Narcotic Drug Act and larceny-receiving stolen goods.

2. He was represented in the Circuit Court by the law firm of Zaccagnino, Linardos and Delaney, which firm also appeared for him in the Superior Court.

3. Peter J. Zaccagnino, Jr., Esq., is an attorney, practicing law in Hartford, Connecticut, in partnership with Robert Delaney, Esq., and George Linardos, Esq. An associate with this firm is Robert Blechman, Esq.

4. In May 1967 Charles Dukes retained Mr. Zaccagnino to represent him in connection with the charge for which he is presently incarcerated. Whereupon Mr. Zaccagnino entered an appearance in the case in the name of his law firm, Zaccagnino, Linardos & Delaney.

5. Both Mr. Zaccagnino and Mr. Delaney on different occasions handled the matter on behalf of the petitioner.

6. At the Superior Court proceedings on May 9, 1967

the petitioner was represented by Peter J. Zaccagnino, Jr., acting as his attorney.

7. Prior to May 9, 1967 Mr. Dukes had discussions with Mr. Zaccagnino regarding his plea during which time Mr. Zaccagnino advised him he should plead guilty to the charges against him. However, Mr. Dukes maintained that he was innocent and would not agree to plead guilty.

8. Prior to May 9, 1967 Mr. Zaccagnino discussed the case a number of times with the State's Attorney.

9. He was put to plea on one count of the Information, the narcotics count.

10. The petitioner pleaded not guilty and elected a jury trial.

11. On May 10, 1967 the case was continued until May 16, 1967 for trial.

12. On May 9, 1967 Mr. Zaccagnino appeared in the Superior Court for Hartford County before Johnson, J., with Mr. Dukes and asked the Court for permission to withdraw from the case because there was "a slight conflict" between Mr. Zaccagnino and his client.

13. Mr. Dukes then addressed the Court himself and advised the Court that he wished to retain counsel other than Mr. Zaccagnino.

14. Mr. Zaccagnino reiterated his request for permission to withdraw from the case and asked the Court for a continuance of one day to enable Mr. Dukes to get other counsel.

15. The Court would not allow Mr. Zaccagnino to withdraw at that time. Mr. Dukes then entered a plea of not guilty and elected a trial by a jury of 12. The Court then

granted a 24-hour continuance and told Mr. Dukes to be prepared for trial the next day.

16. Mr. Zaccagnino reiterated his request for permission to withdraw from the case and asked the Court for a continuance of one day to enable Mr. Dukes to get other counsel.

17. The Court did not allow Mr. Zaccagnino to withdraw from the case.

18. On May 9, 1967 when the petitioner left the court room he was arrested by members of the Hartford Police Department and taken to the Hartford Police Station.

19. As a result of taking pills, he was admitted to McCook Hospital on May 11, 1967 and discharged on May 13, 1967.

20. On May 16, 1967 the petitioner appeared with Robert C. Delaney, Esq., and requested permission of the Court to change his plea to guilty to the information charging the narcotics count, and an amendment to the Information charging the larceny-receiving count.

21. On May 16, 1967 petitioner, with Attorney Robert C. Delaney assisting him, pleaded guilty to the narcotics count and larceny-receiving count.

22. Mr. Delaney was familar with the case and had talked to the petitioner several times about the case and had handled the case in Circuit Court.

23. Between May 9, 1967 and May 16, 1967 Mr. Zaccagnino and Mr. Delaney discussed the case many times and both of them agreed they should try to convince Mr. Dukes to plead guilty. During this period, Mr. Zaccagnino tried to convince Mr. Dukes to plead guilty.

24. Prior to the entry of the guilty pleas, the Court made inquiry as to the voluntariness thereof as follows:

"MR. LABELLE: Yes, Your Honor, and I would like to ask if inquiry would be made as to change of plea and that he be put to plea on both the original information again and this amendment also. Excuse me, Your Honor. The record also ought to appear that Mr. Delaney is here with him today and he is in the office of Mr. Zaccagnino. I think the Court might inquire with respect to the representation since there had been some indication that counsel had asked to withdraw the other day."

"THE COURT: Well now, Mr. Dukes, I want to be sure that everything is in order here. I was present the other day, of course, when you were presented and the problem came up about an attorney. Now I want, now Mr. Delaney is here, are you fully satisfied with the services he is rendering you, Mr. Dukes?"

"THE ACCUSED: Yes, sir."

"THE COURT: You are. And now you know, of course, Mr. Dukes, that — you know of course that the State of Connecticut has the burden of proving you guilty on the charge and you are free to go to trial but you still wish to change your plea, is that correct?"

"THE ACCUSED: Yes, sir."

"THE COURT: And do you do this of your own free will, Mr. Dukes?"

"THE ACCUSED: Yes, sir."

"THE COURT: And you know the probable consequences of it?"

"THE ACCUSED: Yes."

"THE COURT: Very well, and no one has induced you to do this, influenced you one way or the other? You are doing this of your own free will?"

"THE ACCUSED: Yes, sir."

"THE COURT: Very well then. We will accept the change of plea."

The case was continued to June 2, 1967 for sentencing.

25. The petitioner had a lengthy conversation with Mr. Delaney, his counsel, prior to entering his plea.

26. The petitioner recalls completely his conversations held with his attorney, Mr. Delaney, before he entered his guilty plea.

27. His attorney, Mr. Delaney, on May 16, 1967, did not notice anything about his physical condition that would impair his ability to enter his plea.

28. Mr. Zaccagnino was not present in court with the petitioner on May 16, 1967, when he entered his guilty plea.

29. The petitioner on specfic inquiry by the Court before he pleaded told the Court he was satisfied with the representation by Mr. Delaney.

30. On June 2, 1967 the petitioner appeared in Court with Attorney Zaccagnino for sentencing, but the case was continued to June 16, 1967 because the probation report was not finished and because matters to be consolidated from other counties had not been sent to Hartford.

31. On June 16, 1967 the petitioner was presented for sentencing, and Attorney Zaccagnino appeared with him.

32. On June 16, 1967 Mr. Dukes again appeared before the Superior Court for Hartford County, Devlin, J. with Mr. Zaccagnino for sentencing. At that time he advised the Court that he wanted to withdraw his guilty pleas and that he had retained other counsel.

33. The request for permission to change the pleas was denied whereupon Mr. Dukes was sentenced to the State Prison for not less than 5 nor more than 10 years on the First Count and for 2 years on the Second Count.

34. Ancillary to these proceedings Mr. Zaccagnino was representing two girls by the names of Sandra Baker and Andrea Sejerman for offenses unrelated to the charges to which Mr. Dukes had pleaded guilty.

35. The petitioner was a co-defendant in the same case with Sandra Baker and Andrea Sejerman, and they were all charged with conspiracy to obtain money by false pretenses.

36. The petitioner in the case in which he was involved with Sandra Baker and Andrea Sejerman had as his counsel Attorney Boce Barlow.

37. The petitioner was not represented by Attorney Zaccagnino or any member of his firm in the case that he was a co-defendant with Sandra Baker and Andrea Sejerman.

38. Sandra Baker and Andrea Sejerman were not in any way connected with the petitioner in the case charging him with violation of the narcotics act and larceny-receiving stolen goods for which he pleaded guilty.

39. During his remarks on behalf of the Baker and Sejerman girls, Mr. Zaccagnino told the Court that these girls had come under the influence of Charles Dukes who had led them astray. He pointed out that because of their cooperation with the State Police they capitulated Dukes into

pleading guilty. He noted that because of their cooperation Dukes would very shortly be removed from society. He placed the blame for the offenses committed by the girls on Dukes saying that he was the most culpable since he had all the instruments with which to dupe the girls.

40. The sentencing remarks by Attorney Zaccagnino in the Sandra Baker and Andrea Sejerman cases, when he was referring to Dukes, the petitioner, only had to do with the relationship between Dukes and the two girls in that particular case where all three of them were co-defendants.

41. All of the remarks made by Attorney Zaccagnino concerning Dukes and the two girls only pertained to that particular case and had nothing to do with the petitioner's case for which he was sentenced, and which is the subject of this habeas corpus.

42. When the petitioner Dukes hired Mr. Zaccagnino to represent him on the narcotics and larceny-receiving case, the petitioner knew that Mr. Zaccagnino at that time was representing Sandra Baker and Andrea Sejerman in the conspiracy to obtain money by false pretenses case in which the petitioner was a co-defendant and was represented by Mr. Barlow.

43. On June 16, 1967, when the petitioner was presented and sentenced, he indicated to the Court that he had consulted other counsel, the night before.

44. No other counsel had entered any appearance on behalf of the petitioner.

45. The petitioner on June 16, 1967, in connection with his claim about contacting other counsel, did not make any complaint to the Court that he was not satisfied with Attorney Zaccagnino because he represented Sandra Baker and Andrea Sejerman.

Second: The following conclusions of fact have been reached:

46. The petitioner at all times knew that Attorney Zaccagnino represented Sandra Baker and Andrea Sejerman in the conspiracy to obtain money by false pretenses case, a case in which the petitioner was also charged as a co-defendant.

47. The petitioner hired Attorney Zaccagnino to represent him after Attorney Zaccagnino had been retained to represent the two girls, and the petitioner knew when he hired Attorney Zaccagnino to represent him that Attorney Zaccagnino represented the two girls in the unrelated conspiracy to obtain money by false pretenses case, in which he was also involved.

48. There was no connection between the conspiracy to obtain money by false pretenses case and the narcotics and larceny-receiving case for which the petitioner was sentenced.

49. The remarks made by Attorney Zaccagnino on behalf of Sandra Baker and Andrea Sejerman at the time of sentencing on June 2, 1967 concerning the petitioner only had to do with the petitioner's connection with the girls in the conspiracy to obtain money by false pretenses case.

50. The petitioner never made any request to the trial court that he be permitted to obtain new counsel because of any conflict of interest by Mr. Zaccagnino in representing him in the narcotics and larceny-receiving case while at the same time Mr. Zaccagnino represented the two girls in the unrelated conspiracy to obtain money by false pretenses case.

51. On May 16, 1967, when he entered his guilty plea, there was nothing about his physical condition that in any way impaired his ability to enter his plea.

Third: The following conclusions of law have been reached:

52. The voluntariness of the guilty pleas entered by the petitioner on May 16, 1967 has already been determined in *State* v. *Dukes,* 157 Conn. 498, 506.

53. The defendant was not denied the effective assistance of counsel, and there was not any conflict of interest because his counsel represented Baker and Sejerman in an unrelated case.

54. The plea of guilty by the petitioner on May 16, 1967 was the free and understanding expression of his own wishes.

55. The guilty plea entered by the petitioner on May 16, 1967 was intelligently and voluntarily made.

56. The inquiry made by the Court at the time the petitioner entered his guilty plea was adequate and sufficient for the Court to determine that the guilty plea of the petitioner was voluntarily and intelligently made.

Fourth: The petitioner made the following claims of law respecting the judgment to be rendered upon which the Court ruled as hereinafter stated:

57. Petitioner's pleas of guilty were involuntarily made in that he was denied the effective assistance of counsel due to the conflict of interest that his attorney had in representing two clients whose interests were adverse to his, but the Court ruled that petitioner could not complain of a conflict of interest since he knew of both representations at the time of his plea.

58. The record fails to disclose facts sufficient to establish the voluntariness of the petitioner's guilty pleas in that the trial Court did not make adequate inquiry to establish

same, but the Court ruled that the trial Court had made sufficient inquiry.

59. Judgment should enter setting aside petitioner's pleas of guilty and granting petitioner's petition for writ of habeas corpus.

All of these claims the Court denied.

Fifth: All of the exhibits introduced into evidence on the trial of this matter together with the transcripts of the prior proceedings annexed to the Respondent's Return are hereby made a part of the record and may be used on the appeal to the Supreme Court without printing.

LEVINE, J.

Filed May 27, 1970.

Assignment of Errors on Habeas Corpus Appeal

The Court erred:

1. In refusing to find the material facts set forth in paragraphs 17 and 18 of the Draft Finding which were admitted or undisputed;

2. In refusing to reach the conclusions stated in paragraphs 21, 22, 23, 24 and 25 of the Draft Finding;

3. In reaching the conclusions of law stated in paragraphs 52, 53, 54, 55 and 56 of the Finding;

4. In denying the claims of law made by the Petitioner in paragraphs 57, 58 and 59 of the Finding;

5. In denying the Petition for Habeas Corpus and rendering judgment for the defendant when the conclusions

reached by the Court do not support it in that on the face of the record a conflict of interest is apparent thereby depriving the Petitioner of the effective assistance of counsel.

Petitioner, CHARLES O. DUKES
By JAMES A. WADE
His Attorney

Filed June 8, 1970.

Read June 15, 1970.
LEVINE, J.

SUPREME COURT
HARTFORD COUNTY } CLERK'S OFFICE

The above and foregoing is a true copy of the record in said case to be used in the trial in the Supreme Court.

Attest, DOMINIC A. DiCORLETO
Clerk.

OPINION BELOW

CHARLES O. DUKES
v.
WARDEN, CONNECTICUT STATE PRISON

Habeas corpus alleging unlawful imprisonment, brought to the Superior Court in Hartford County and tried to the court, *Levine, J.*; judgment dismissing the appeal, from which the plaintiff appealed. *No error.*

James A. Wade, for the appellant (plaintiff).

Richard F. Banbury, assistant state's attorney, with whom, on the brief, was *John D. LaBelle*, state's attorney, for the appellee (state).

LOISELLE, J. The plaintiff pleaded guilty, on May 16, 1967, to two counts in an information charging a violation of the Uniform State Narcotic Drug Act in the first count, and larceny in the second count. He was sentenced to state prison on June 16, 1967.

This appeal is taken from a judgment rendered January 15, 1970, denying his application for a writ of habeas corpus after a full hearing on the merits. Statutory certification for the appeal to this court was granted pursuant to General Statutes § 52-470.

This court has previously affirmed the plaintiff's conviction in connection with a direct appeal taken by him. *State* v. *Dukes,* 157 Conn. 498, 255 A.2d 614. The plaintiff, however, has made certain claims involving his federal constitutional rights in the instant appeal from the judgment denying his petition for a writ of habeas corpus which were not raised on direct appeal.

It is well established that a guilty plea which is not made voluntarily and intelligently constitutes a violation of a defendant's federal constitutional rights and a judgment of conviction based on such a plea cannot stand. See *Brady* v. *United States,* 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747; *Boykin* v. *Alabama,* 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274; *McCarthy* v. *United States,* 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418; *Machibroda* v. *United States,* 368 U.S. 487, 493, 82 S. Ct. 510, 7 L. Ed. 2d 473; *Kercheval* v. *United States,* 274 U.S. 220, 223, 47 S. Ct. 582, 71 L. Ed. 1009; *Consiglio* v. *Warden,* 160 Conn. 151, 160, 276 A.2d 773; *Williams* v. *Reincke,* 157 Conn. 143, 148, 249 A.2d 252. The plaintiff in his petition alleged that his guilty plea was not voluntary and intelligent on several grounds. On appeal, however, he has asserted in essence only that he was denied the effective assistance of counsel which rendered his plea involun-

tary, and that the trial court did not make an adequate on-the-record inquiry into the voluntariness of his plea.

The plaintiff's primary claim is that the trial court erred in concluding that he was not denied the effective assistance of counsel and in overruling his claim that his plea was rendered involuntary by the ineffective assistance of counsel.

The following facts are relevant to this claim. The plaintiff was arrested in Hartford in March, 1967 on the two charges previously mentioned. He was represented in the Circuit Court by Robert C. Delaney, a member of the law firm of Zaccagnino, Linardos and Delaney, on the bindover proceedings. Between the time of the bindover proceedings and May 9, 1967, when the plaintiff appeared in the Superior Court for Hartford County for the entry of his plea, he had had discussions with Peter J. Zaccagnino, Jr., a member of the above-named law firm, regarding his plea. At the Superior Court hearing on May 9, 1967, the plaintiff had further discussions with Attorney Zaccagnino who advised him to plead guilty. The plaintiff maintained his innocence and pleaded not guilty after some further discussion with the court, the state's attorney and Attorney Zaccagnino.

On May 16, 1967, the plaintiff appeared with Attorney Delaney and requested permission of the court to change his plea concerning the two counts in the information. After a lengthy discussion with Attorney Delaney and after searching questions by the court *(Johnson, J.)* concerning the change of plea, the plaintiff pleaded guilty to both charges. Attorney Zaccagnino was not present in court with the plaintiff when he entered his guilty plea.

On June 2, 1967, the plaintiff appeared in court with Attorney Zaccagnino for sentencing but the case was continued to June 16, 1967, at which time the plaintiff again appeared in court with Attorney Zaccagnino for sentencing.

At that time he requested that his plea of guilty to both charges be withdrawn but the court denied his request and proceeded to sentence him to the state prison.

Ancillary to these proceedings, Attorney Zaccagnino represented two girls charged with conspiracy to obtain money by false pretenses in another unrelated case in which the plaintiff was a codefendant. The plaintiff was represented in that case by other counsel. The girls were in no way connected with the instant case in which the defendant pleaded guilty. Prior to their sentencing by the court, Attorney Zaccagnino made certain remarks on their behalf and stated that the plaintiff had led the two girls astray; that the cooperation of the two girls had led the plaintiff to plead guilty in that case and that because of such cooperation the plaintiff would very shortly be removed from society. He also stated that the blame for the offenses committed by the two girls should be placed on the plaintiff as he was the most culpable since he had all the instruments with which to dupe the girls. These remarks by Attorney Zaccagnino concerning the plaintiff had only to do with the relationship of the plaintiff and the two girls in that particular case where all three of them were codefendants, and in no way referred to the instant case for which he was later to be sentenced.

None of the aforementioned facts found by the court are attacked by the plaintiff. The plaintiff, however, assigns error in the trial court's refusal to find certain paragraphs of his draft finding. The paragraphs in question state that on April 18, 1967, Attorney Zaccagnino represented the two girls when they appeared to plead guilty, that on June 2, 1967, he represented them when they appeared for sentencing, and that these appearances were before the same judge *(Devlin, J.)* before whom the plaintiff in this case later appeared for sentencing. The plaintiff has printed in his appendix portions of the transcript of the proceedings at which the girls were

represented by Attorney Zaccagnino which disclose that the omitted facts were true. The state in its counterfinding included the same requests as were included in the paragraph in question of the plaintiff's draft finding. Moreover, the trial court in its memorandum of decision takes note of the omitted facts and treats them as undisputed. In light of the foregoing, we will take cognizance of the facts in question. See *State* v. *Mahmood,* 158 Conn. 536, 539, 265 A.2d 83.

In connection with the plaintiff's direct appeal this court held that the trial court did not err in concluding: That his plea of guilty on May 16, 1967, was voluntary and intelligent; that he had ample time to change counsel or indicate a desire again to change his plea between May 16 and June 16; that no credibile evidence was introduced in support of his request to change his plea made at the time of sentencing on June 16; that his request to change his plea made at this time was for the purpose of delaying sentencing, and that it would not be fair and just under all the circumstances to allow the defendant again to change his plea. *State* v. *Dukes,* 157 Conn. 498, 506, 255 A.2d 614.

In *Glasser* v. *United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, the Supreme Court enunciated the principle that a conflict of interest in the representation of two or more defendants in the same case by the same counsel constitutes a denial of effective assistance of counsel. The mere fact, however, of joint representation of codefendants by a single attorney is not sufficient to establish ineffective assistance of counsel in the absence of a showing of an actual conflict of interest prejudicial to one of the defendants. See *United States* v. *Youpee,* 419 F.2d 1340, 1346 (9th Cir.); *United States* v. *Sheiner,* 410 F.2d 337, 343 (2d Cir.); *United States* v. *Berriel,* 371 F.2d 587 (6th Cir.); *Mohler* v. *United States,* 312 F.2d 228, 230 (7th Cir.), cert. denied, 374 U.S. 854, 83 S. Ct. 1922, 10 L. Ed. 2d 1074; *Lott* v. *United States,* 218 F.2d 675, 681 (5th Cir.); *State* v. *Costa,* 155 Conn. 304, 308, 228

A.2d 561, cert. denied, 389 U.S. 1044, 88 S. Ct. 789, 19 L. Ed. 2d 837.

The plaintiff claims that he was denied the effective assistance of counsel because there was a conflict of interest between Attorney Zaccagnino's representation of him in this case and his representation of the two defendants in another entirely unrelated case wherein he was a codefendant while the instant case was pending. This claim is based on the fact that Attorney Zaccagnino made derogatory remarks about the plaintiff to the trial judge before whom he was appearing on behalf of the two defendants in the other unrelated case, apparently in an effort to secure lighter sentences for them. The plaintiff contends that he was prejudiced by these remarks because they were made before the same judge who, two weeks later, sentenced him for the offenses with which he was charged in this case.

Even assuming, arguendo, that there was a denial of the effective assistance of counsel because of a conflict of interest prejudicial to the plaintiff, the only question in this regard presented by this appeal is whether the conflict rendered the plea involuntary and unintelligent. Since *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, it has been clear that a plea of guilty to a felony charge entered without counsel is invalid. *Brady* v. *United States*, 397 U.S. 742, 748 n.5, 90 S. Ct. 1463, 25 L. Ed. 2d 747; see *White* v. *Maryland*, 373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193; see generally, note, 25 L. Ed. 2d 1025, 1032. Where, as here, however, a guilty plea is entered upon the advice of counsel, the plea constitutes an admission of guilt and a waiver of nonjurisdictional defects and claims, including federal constitutional claims, which might otherwise be raised by way of defense, appeal or collateral attack. See *United States ex rel. Rogers* v. *Warden*, 381 F.2d 209, 212 (2d Cir.); *United States* v. *Doyle*, 348 F.2d 715, 718 (2d Cir.), cert. denied, 382 U.S. 843, 86 S. Ct. 89, 15 L. Ed. 2d 84; *United*

States ex rel. Boucher v. *Reincke,* 341 F.2d 977, 980 (2d Cir.); *Consiglio* v. *Warden,* 160 Conn. 151, 166, 276 A.2d 773; *Williams* v. *Reincke,* 157 Conn. 143, 147, 249 A.2d 252. This waiver rule means that a claim of the ineffective assistance of counsel due to an alleged conflict of interest, standing alone, is not sufficient to call the validity of a guilty plea and the judgment of conviction based thereon into question. *Curry* v. *Burke,* 404 F.2d 65 (7th Cir.); *Vanater* v. *Boles,* 377 F.2d 898, 901 (4th Cir.); *Martin* v. *United States,* 256 F.2d 345, 349 (5th Cir.), cert. denied, 358 U.S. 921, 79 S. Ct. 294, 3 L. Ed. 2d 240; *In re Shuttle,* 125 Vt. 257, 262, 214 A.2d 48. Of course, a guilty plea does not constitute a waiver of a claim that the plea itself was rendered involuntary and unintelligent as a result of a violation of an accused's fundamental constitutional rights. See *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116, 118, 76 S. Ct. 223, 100 L. Ed. 126; *Doran* v. *Wilson,* 369 F.2d 505, 507 (9th Cir.); *Williams* v. *Reincke,* supra, 148. Thus, an allegation of the ineffective assistance of counsel is a factor to be taken into consideration in determining whether a guilty plea was voluntary and intelligent, but for the plea and the judgment of conviction based thereon to be overturned on this ground, it must be demonstrated that there was such an interrelationship between the ineffective assistance of counsel and the plea, that it can be said the plea was not voluntary and intelligent because of the ineffective assistance. See *Parker* v. *North Carolina,* 397 U.S. 790, 796, 90 S. Ct. 1458, 25 L. Ed. 2d 785; *McMann* v. *Richardson,* 397 U.S. 759, 770, 90 S. Ct. 1441, 25 L. Ed. 2d 763; *United States ex. rel. Boucher* v. *Reincke,* supra, 981.

There is nothing in the record before us which would indicate that the alleged conflict resulted in the ineffective assistance of counsel and did in fact render the plea in question involuntary and unintelligent. The plaintiff does not claim, and it is nowhere indicated in the finding, nor could it be inferred from the finding, that either Attorney Zaccag-

nino or Attorney Delaney induced the plaintiff to plead guilty in furtherance of a plan to obtain more favorable consideration from the court for other clients. See *United States ex rel. Taylor* v. *Rundle,* 305 F. Sup. 1036, 1039 (E.D. Pa.). Neither does the finding in any way disclose, nor is it claimed, that the plaintiff received misleading advice from Attorney Zaccagnino or Attorney Delaney which led him to plead guilty. *McMann* v. *Richardson,* supra; *Parker* v. *North Carolina,* supra. Moreover, the trial court specifically found that when the plaintiff engaged Zaccagnino as his counsel, he knew that Zaccagnino was representing two defendants in the unrelated case in which he was a codefendant, that he never complained to the Court that he was not satisfied with Attorney Zaccagnino because of this dual representation, that he was not represented at the entry of his plea by Attorney Zaccagnino, that he was represented by Attorney Delaney at the entry of his plea, that he had a lengthy conversation with Attorney Delaney prior to entering his plea which he recalled completely, and that on specific inquiry by the court before he pleaded guilty, he told the court that he was satisfied with the representation by Attorney Delaney. The court did not err in concluding that the plaintiff's plea was not rendered involuntary and unintelligent by the alleged conflict of interest.

Obviously, the derogatory remarks by Attorney Zaccagnino on behalf of his clients in one case about a client whom he is representing in another case were highly improper. "When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion." *Grievance Committee* v. *Rottner,* 152 Conn. 59, 65, 203 A.2d 82; see *United States ex rel. Taylor* v. *Rundle,* supra; *Commonwealth* v. *Cullen,* 216 Pa. Super. 23, 260 A.2d 818. Attorney Zaccagnino is not a party to these proceed-

ings and the question as to whether or not his conduct was such as to merit disciplinary action is not before us for decision on this appeal. We do not, accordingly, express any opinion as to what, if any, disciplinary action should be taken by the appropriate committee or by the Superior Court. As we have pointed out, the only question at issue here is whether counsel's action rendered the plaintiff's plea involuntary and unintelligent.

The plaintiff also claims that the trial court erred in concluding that the on-the-record inquiry made by the trial court at the entry of his plea was adequate for the court to determine that the plea was voluntary and intelligent. The plaintiff contends that the court's inquiry did not satisfy the requirements of *Boykin* v. *Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, in which the United States Supreme Court held that it could not be presumed on the basis of a silent record that a plea was knowingly intelligent and voluntary. This court, however, recently held that the *Boykin* rule was not applicable retroactively to cases such as the present case in which the plea was entered prior to the *Boykin* decision. *Cosiglio* v. *Warden,* 160 Conn. 151, 166, 276 A.2d 773. Moreover, the record in this case is far from being a silent one. The plaintiff was questioned by the trial court about his satisfaction with his counsel, about his understanding that the state had the burden of proof, about his understanding that he was entitled to a trial, and about the probable consequences of his plea. He was also asked directly whether he was induced or influenced to plead guilty and whether his plea was of his own free will. In short, the plaintiff's claim that the trial court's inquiry was not adequate to determine the voluntariness of the plea is without merit.

There remains the state's contention that the plaintiff waived his right to raise these claims because he did not make them on direct appeal. This need not be considered in-

asmuch as we have found that the plaintiff's claims are without merit.

Although the determination that the plaintiff's guilty plea was voluntarily and intelligently made is dispositive of the appeal, to be certain that there was no injustice to the plaintiff at the time of sentencing, we have reviewed the entire transcript of the proceedings of June 2 and June 16, 1967. In addition, the entire record and briefs of the former appeal were also reviewed. The improper remarks made by counsel on June 2, 1967, were a repetition of what had already been told to the court in substance by the state's attorney. All of this was contained in great detail in the presentence report. The sentence imposed by the court on June 16, 1967, was an adoption of the recommendation made by the state's attorney. After the aforementioned thorough review, we are unable to find any indication of prejudice in respect to the sentencing of the plaintiff.

There is no error.

In this opinion the other judges concurred.

JUDGMENT BELOW

This appeal by the petitioner from the judgment of the Superior Court was filed with the Clerk of said Court on the 3rd day of March, 1970, and said appeal came thence to the 8th day of June, 1970, when the appellant filed his assignment of errors, as may appear in the certified transcript of record on file in this Court, and said appeal came thence to this Court at its term held at Hartford on the first Tuesday of April, 1971, and thence to the present term when the parties appeared and were fully heard.

And now this Court finds there is no error.

Whereupon it is adjudged that said judgment be affirmed.

Date of Judgment: June 25, 1971.

By the Court,
THOMAS H. ABRAHAM
Clerk

EXHIBIT 1, HABEAS CORPUS

#28080

STATE
V.
ANDREA SEJERMAN

SUPERIOR COURT
HARTFORD COUNTY
APRIL 18, 1967

BEFORE HONORABLE RAYMOND J. DEVLIN, JUDGE

JOHN D. LABELLE, ESQ.
FOR THE STATE

PETER J. ZACCAGNINO, JR., ESQ.
FOR THE ACCUSED

MR. LABELLE: May inquiry be made as to change of plea, to the first and third counts, Your Honor?

ASSISTANT CLERK PAUL LEVINE: Andrea Sejerman, on April 4th, 1967, to an information charging you with conspiracy to obtain money by false pretenses, five counts, you entered a plea of not guilty and elected a trial by jury of twelve. Do you now wish to withdraw your plea and election as to the first and third counts?

THE ACCUSED: Yes.

MR. LEVINE: Do you waive reading of the information?

MR. ZACCAGNINO: Waive the reading.

MR. LEVINE: Andrea Sejerman, to the second count of the information charging you with conspiracy to obtain money by false pretenses, what is your plea, guilty or not guilty?

THE ACCUSED: Not guilty. Guilty.

MR. LEVINE: To the third count of the information charging you with conspiracy to obtain money by false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LABELLE: In view of those pleas, Your Honor, the State will nolle the other counts. They all occurred the same day as part of the same set of circumstances.

THE COURT: All right, one, four and five are nolled.

MR. LABELLE: May this be assigned for presentence report and be set down for disposition on the 19th of May?

THE COURT: Pre-sentence investigation ordered. 19th of May.

MR. ZACCAGNINO: If Your Honor please, I hope, I am making the request from some other counties to have them sent here. If they are not completed by that day I may have to request a continuance, because there are some other counties that have matters pending on the same charge.

THE COURT: All right.

EXHIBIT 2, HABEAS CORPUS

#28081

STATE	SUPERIOR COURT
V.	HARTFORD COUNTY
SANDRA BAKER	APRIL 18, 1967

BEFORE HONORABLE RAYMOND J. DEVLIN, JUDGE

JOHN D. LABELLE, ESQ.
FOR THE STATE

PETER J. ZACCAGNINO, JR., ESQ.
FOR THE ACCUSED

MR. LABELLE: May inquiry be made as to change of plea to the first and third counts?

ASSISTANT CLERK PAUL LEVINE: Sandra Baker, on April 4th, 1967, to an information charging you with conspiracy to obtain money by false pretenses in five counts, you entered a plea of not guilty and elected a trial by a jury of twelve. Do you now wish to withdraw your plea and election as to the first and third counts?

THE ACCUSED: Yes.

MR. LEVINE: Do you waive reading of the information?

MR. ZACCAGNINO: Waive the reading.

THE COURT: Is the mother here?

MR. ZACCAGNINO: Yes, the mother is here. Step forward.

MR. LEVINE: Sandra Baker, to the first count of the information charging you with conspiracy to obtain money by false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the third count of the information charging you with conspiracy to obtain money by false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LABELLE: The State will nolle the other three counts, Your Honor, for the same set of circumstances.

MR. ZACCAGNINO: There's also other matters that will need transfer to this county also.

MR. LABELLE: May this go down for May 19th?

THE COURT: Pre-sentence investigation ordered. Continued until the 19th.

EXHIBIT 3, HABEAS CORPUS

#28080
STATE
V.
ANDREA SEJERMAN
} SUPERIOR COURT

#28081
STATE
V.
SANDRA BAKER
} HARTFORD COUNTY
JUNE 2, 1967

BEFORE HONORABLE RAYMOND J. DEVLIN, JUDGE

GEORGE A. SILVESTER, ESQ.
FOR THE STATE

PETER J. ZACCAGNINO, JR., ESQ.
FOR THE ACCUSED

MR. SILVESTER: If Your Honor pleases, both accused are represented by Attorney Peter Zaccagnino. Now, let's see, in the case of Sejerman she is twenty-one. Is that so?

MR. ZACCAGNINO: Yes, Your Honor.

MR. SILVESTER: And in the case of Sandra Baker she is a minor, nineteen.

MR. ZACCAGNINO: Her mother is here, Your Honor.

MR. SILVESTER: Now as I understand the situation, if Your Honor pleases, at a prior time both accused have pled guilty to charges of conspiracy to obtain money by false pretenses in two counts and the matter's been referred to the Adult Probation Department for pre-sentence investigation and report. In the meantime some warants have been received from — is it Litchfield County?

ASSISTANT CLERK PAUL LEVINE: Yes.

MR. SILVESTER: On which they have to be put to plea this morning.

MR. LEVINE: Yes. This is Litchfield County #4502, State of Connecticut versus Sandra M. Baker.

MR. ZACCAGNINO: We'll waive the reading.

MR. LEVINE: Sandra M. Baker, to the first count of the information charging you with uttering and publishing a false, forged and counterfeited document and signature with intent to defraud in violation of 53-346, what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the second count of the information charging you with uttering a forged instrument what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the third count of the information charging you with uttering a forged instrument what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the fourth count of the information charging you with conspiracy what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: This is Litchfield County #4503, State of Connecticut verus Andrea Sejerman.

MR. ZACCAGNINO: We'll waive the reading.

MR. LEVINE: Andrea Sejerman, to the first count of the information charging you with uttering a forged document what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the second count of the information charging you with uttering a forged instrument what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the third count of the information charging you with uttering a forged instrument what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the fourth count of the information charging you with conspiracy what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. SILVESTER: If Your Honor pleases, as far as I can determine the nature of the involvement with respect to both of these young ladies is that they became associated with one Charles Dukes who is co-accused awaiting sentencing in this court, and Charles Dukes had paraphernalia with respect to checks and money orders and they agreed to cash these checks with false credentials furnished by him. I can't tell Your Honor the extent of the amount that is involved here.

The records of the accused in the case of Sejerman is attached to the pre-sentence report and apparently she has no prior convictions, and in the case of the accused Baker

her record is set out on page two of the pre-sentence report, and apparently here, too, there are no prior convictions.

I'm sorry, I'm advised, Your Honor, there are warrants from Fairfield County also.

MR. LEVINE: This is Fairfield County #26756, State versus Sandra Baker.

MR. ZACCAGNINO: We'll waive the reading.

MR. LEVINE: Sandra Baker, to the first count of the information charging you with obtaining money under false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. SILVESTER: How many counts is that?

MR. LEVINE: I think there are four.

MR. SILVESTER: If Your Honor pleases, I don't know exactly what my authority is, but if she pleads to one count the State would be willing to nolle the other three counts.

THE COURT: I think we ought to get them all on the record and treat them as one.

MR. SILVESTER: Very well.

MR. LEVINE: To the second count of the information charging you with obtaining money by false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the third count of the information charging you with obtaining merchandise and money what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the fourth count of the information charging you with obtaining money under false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: This is Fairfield County 26 — 16758, Andrea Sejerman

MR. ZACCAGNINO: Waive the reading.

MR. LEVINE: Andrea Sejerman, to the first count of the information charging you with obtaining money under false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the second count of the information charging you with obtaining money under false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. LEVINE: To the third count of the information charging you with obtaining money under false pretenses what is your plea, guilty or not guilty?

THE ACCUSED: Guilty.

MR. SILVESTER: Are there some from New Haven there also, Mr. Clerk?

MR. LEVINE: I don't see any from New Haven.

MR. SILVESTER: May I have a moment, if Your Honor please? I am advised, Your Honor, there are other outstanding warrants, especially from New Haven County, which apparently haven't been forwarded to Hartford.

If Your Honor pleases, the presentence reports are before Your Honor. There has been no discussion with respect to penalty, and the matter is being submitted to Your Honor without recommendation.

MR. ZACCAGNINO: If Your Honor pleases, with respect to these two girls, both of them have had psychiatric help in the past, and both of them have been to a psychiatrist after this arrest, and I received the reports too late to file them with the probation reports. I'd like to have them submitted to Your Honor for perusal.

MR. SILVESTER: No objection.

THE COURT: All right.

MR. ZACCAGNINO: If Your Honor pleases, as a result of this arrest Andrea Sejerman spent thirty-three days in jail waiting to make bond, and Sandra Baker spent sixty days in jail. As Your Honor knows from looking at the probation report and from the circumstances involved, both of them came under the influence of Charles Dukes. Now how they could get in a position to come under the influence of somebody like him, if Your Honor pleases, creates the problem here that I think is the cause of the whole situation.

Both these girls left their homes, came under the influence of Dukes and got involved. I think, Your Honor, though, that the one thing I might say about both of them that should stand in their good stead, as a result of their willingness to cooperate with the State Police they capitulated Dukes into making a plea. I think. Your Honor, since I was on both sides of the case, having been on the other side on the other case I can tell Your Honor that it was these girls that because of their refusal, not refusal, not to cooperate with Dukes and to testify against him that capitulated him into taking a plea on which he will shortly be removed from

society, so I think this, Your Honor, the only question here is what to do with these girls.

I have spent a lot of time with both their parents. Their parents for the period of time in which they were away did lose control of these girls, but both the parents, both mothers of these two girls are in the courtroom today, and both of them have a great concern for their daughters. I have advised them from the beginning it was my thought the only way they could help themselves the most was going back with their parents, but here they stand before Your Honor for punishment. It's up to Your Honor to decide what to do. It's easy to say they are involved with a lot of crimes, let's send them to the State Farm, that's where they should be. It would seem at first blush that's where they should go.

Both of them have no records to speak of. The record they did have, obviously, looking at the charge one knows it had to be involved with Dukes. Also both cases were nolled, because of a similar circumstances that involved them the case was nolled and they weren't convicted. The only things that stand before Your Honor are these particular offenses.

I would say, Your Honor, apparently Andrea needs some out-patient clinic help. I showed the report to her mother and she has agreed to help her. If Your Honor were to feel that perhaps the State Farm was not the place for these girls I think, Your Honor, that normally, under normal circumstances that the first time that these cases such as this come up before Your Honor — I realize there's a lot of charges, but Your Honor knows from Your Honor's own experience on the bench, when there is a great number of offenses they are like one instance because after they are caught it ceases the activity, in other words, one or twenty. Granted, society has been injured more by twenty, however Your Honor can treat them like one transaction, one instance, because once the arrest takes place and the mental processes go on about

attempting to rehabilitate themselves it ceases the activity. It's like the housewife who thinks she's going to steal something, gets caught once and doesn't do it again, doesn't repeat.

I think, Your Honor, with the great interest the parents have shown in the girls it may be there is some hope for the girls. I think since both of them have been in jail and spent some time in jail I'd respectively recommend, Your Honor, that they be given a long sentence in the State Farm for Women, not just a short one, and be put on probation. In this way the State will have great control of them. If they go to the north end or some place they are told to stay out of they will do their term in the State Farm.

We have a probation department. If there is anybody that can be helped I think it's the first offender, the one that comes for sentencing the first time, and if they can't help the first offender I don't know who they can help. Both mothers are here and they both express great concern that they can help these girls. I think with the proper psychiatric help they may open up their eyes that the easy life is not the easy life they thought it would be.

It's most difficult. I know Your Honor will have great difficulty in what to do. As I say, there is more to the case than meets the eye. I think the one thing is so important, that they had enough courage to say they were willing to testify. That's always been their position with the police, and as a result of their statements to the police and their cooperation with the police which led to the downfall of Dukes, and of course, Your Honor, without going into great detail, it's obvious from looking at the report who the most culpable person is because he had all the instruments with which to dupe these girls.

Both of them, looking at the psychiatric reports Your Honor can see both are easily led, easily swayed. Like the

person that gets involved with narcotics they are all the same cut, they are easily talked into these things. I don't say this is in any way at all, Your Honor, a justification for what they did, but it certainly should go to mitigation of punishment. I think the one thing I'm trying to impress upon Your Honor is that these girls did tell the police they would testify and they are willing to testify in any other matters pending against Dukes in which they are involved, which I think, Your Honor, shows that they have the knowledge that they did wrong and are willing to face what is coming to them, but part of the rehabilitation comes, Your Honor, when they first realize that they have done something wrong and they are willing to stand on their two feet and face what is to be done with them.

I do think both of them have received a great amount of publicity and a great amount of anguish. What is to happen to them? Your Honor can see from the psychiatric reports and all the other reports. I just hope Your Honor takes into consideration the fact they have spent some time in jail. I think the taste of jail has taught them more than anything else that could have happened. I think they have learned a lesson and are entitled to one chance to put them back into society, and get this one chance, see if they can go straight. I think it might be more of a weapon against them, a heavy sentence over their head and probation, than actually sending them to jail or the State Farm.

THE COURT: Counsel, my only problem is whether to send them to jail or the State Farm. What do you want?

MR. ZACCAGNINO: I think, Your Honor, they both would rather go to jail than State Farm. This way they can be closer to their parents and all the other things.

THE COURT: One of them spent sixty days in jail and the other thirty?

MR. ZACCAGNINO: Yes, Your Honor. Andrea spent thirty-three, and Sandra sixty.

THE COURT: Do you want to say anything, Sandra?

THE ACCUSED BAKER: No, Your Honor.

THE COURT: Do you want to say anything, Andrea?

THE ACCUSED SEJERMAN: No, Your Honor.

THE COURT: Sentence in both cases will be one year in jail, the execution of which will be suspended after serving six months, probation for a period of three years. That will apply concurrently on all the charges.

EXHIBIT A – HABEAS CORPUS – RECORD ON APPEAL IN CRIMINAL CASE.

In the Superior Court of the State of Connecticut, Hartford County, May Term, A.D. 1967. John D. LaBelle, State's Attorney for the County of Hartford, accuses Charles O. Dukes of Hartford, Connecticut, of Violation of Uniform State Narcotic Drug Act, and charges that at the City of Hartford, on or about the 14th day of March, 1967, the said Charles O. Dukes did possess, have under his control, sell, or dispense narcotic drugs, to wit: heroin, an opium derivative (as defined in Section 19-244 of the General Statutes of Connecticut), in violation of Sections 19-246 and 19-265 of the 1965 Supplement to the General Statutes.

JOHN D. LABELLE
State's Attorney

Amendment to Information

The information is herein amended by adding the following count:

Second Count

And the said Attorney further accuses the said Charles O. Dukes of Larceny, and charges that at the City of Hartford, on or about the 14th day of March, 1967, the said Charles O. Dukes stole various articles of a value in excess of Two Hundred Fifty Dollars ($250) but less than Two Thousand Dollars ($2,000), in violation of Section 53-63 of the 1965 Supplement to the General Statutes, and Section 53-65 of the General Statutes, Revision of 1958.

JOHN D. LABELLE
State's Attorney

STATE OF CONNECTICUT

No. 28358

STATE	SUPERIOR COURT
V.	HARTFORD COUNTY
CHARLES O. DUKES	JUNE 16, 1967

HON. RAYMOND J. DEVLIN, JUDGE

John D. LaBelle, State's Attorney for the County of Hartford accuses Charles O. Dukes of Hartford of Violation of Uniform State Narcotic Drug Act at the City of Hartford on or about March 14, 1967 in violation of Sections 19-246 and 19-265 of the 1965 Supplement to the general statutes as charged in the information and the said attorney further accuses the said Charles O. Dukes of Larceny (value in excess of $250.00 but less than $2000.00) at the City of Hartford on or about March 14, 1967 in Violation of Section 53-63 of the 1965 Supplement to the general statutes, and Section 53-65 of the general statutes, Revision of 1958 as charged in the second count of the amendment to information as on file will appear.

To both counts of said information on May 16, 1967 the said Charles O. Dukes pleaded and said that he was guilty.

Whereupon this court doth accordingly adjudge the said Charles O. Dukes guilty as charged in both counts of said information and that he be imprisoned in the Connecticut State Prison for not less than five (5) years and not more than ten (10) years on the first count and two (2) years on the second count.

DOMINIC A. DiCORLETO
Clerk

Appeal

In the above entitled action, the defendant appeals to the Supreme Court from:

(a) The judgment rendered therein;

(b) The denial by the Court of the defendant's request for a change of plea from "Guilty" to one of "Not Guilty";

(c) The Court's denial of the defendant's request for a trial;

(d) The denial of the Court of the motion of the attorney to withdraw his appearance on behalf of the defendant; and

(e) The denial of the Court of the defendant's motion to obtain substitute counsel to represent him.

The Defendant — CHARLES O. DUKES
By: ALPHONSE C. FASANO
His Attorney

Filed June 26, 1967.

Request For Finding

The appellant in the above entitled case respectfully requests a finding of facts for an appeal to the supreme court of errors and submits the draft finding hereto annexed.

The questions of law which he desires to have reviewed are:

1. Whether the court erred in denying on May 9, 1967 defendant's request to engage other private counsel.

2. Whether the court erred on May 9, 1967 in refusing to grant counsel of records motion to withdraw.

3. Whether the court erred on May 9, 1967 in refusing to grant the defendant's request for a continuance.

4. Whether the court erred on May 9, 1967 in ordering the defendant to be put to plea in the light of all the circumstances.

5. Whether the court erred on May 9, 1967 under the circumstances in ordering the defendant to proceed with the trial of the case on May 10, 1967.

6. Whether the court erred on May 9, 1967 in ordering defendant to proceed with the trial of the case on May 10, 1967 when counsel for the accused represented to the court that he was notified on Monday, May 8, 1967 to present the accused on May 9, 1967 and counsel for the accused believed that the defendant was to be presented for plea.

7. Whether the court erred on June 16, 1967 in refusing permission to counsel of record for the accused to withdraw as attorney for the defendant in the light of the attorney's representations to the court.

8. Whether the court erred on June 16, 1967 in denying the defendant's request to withdraw his plea of guilty in the light of all the circumstances and representations.

9. Whether or not the plea of guilty by the accused was a voluntary one free of any undue influence in the light of the disclosure made to the court on June 16, 1967.

10. Whether the defendant was denied his constitutional guarantees under the Fifth and Sixth Amendments of the United States Constitution to have the assistance of counsel of his own choosing for his defense.

11. Whether under the circumstances, the defendant has been denied due process of law as guaranteed to him under the United States Constitution.

12. Whether the defendant was denied his constitutional right to engage private counsel at his own expense and be given a reasonable opportunity to prepare for trial.

The Defendant
By: ALPHONSE C. FASANO
His Attorney

Filed August 1, 1967.

Draft Finding

PART I

The following facts are found:

* * *

6. When the Court convened, defendant's counsel addressed the Court and represented that between the night of May 8, 1967 and the morning of May 9, 1967, he had had a number of conversations with the defendant as a result of which he was going to petition the Court to formally withdraw from the case because of a conflict between counsel of record and the defendant. (T. 1-2)

7. Defendant, whom counsel was representing were in disagreement on a matter which basically goes to the heart of counsel's representation of the defendant.

8. Defendant's counsel further represented to the Court that in good conscience and in fairness to the defendant, who had not yet been put to plea and who was to answer to a very serious charge and with counsel's difference with

the defendant on a matter that may go to the heart of representing the defendant, counsel's motion to withdraw should be granted. (T. 2)

9. Counsel further represented to the Court in support of his request to withdraw that defendant may get other counsel; that because of the very basic position of an advocate in behalf of a defendant who must believe in the cause in which he is addressing himself and there are some things in which counsel and defendant are in disagreement which may prejudice the defendant. (T. 2-3)

10. The State's Attorney stated to the Court that if other counsel appears, ready to go to trial on May 9, 1967, he would have no objection, and until other counsel appears, there is no basis to withdraw and the State was ready to try the case that day. (T. 3)

11. Defendant's counsel represented to the Court that the State's Attorney called him on Monday, May 8, 1967 and informed him to be ready on Tuesday, May 9, 1967; that he understood that to mean to be ready to plead on Tuesday morning. (T. 10-11)

12. Counsel then represented to the Court that defendant either wants to represent himself or get counsel outside the County in whom defendant can have more confidence. (T. 11)

13. That the defendant personally stated to the Court that he did not want local counsel; that he wanted an opportunity to hire outside counsel. (T. 13)

14. The Court stated to the accused that it was late to bring this matter up; that the State is ready for trial; that he was notified for trial and so the trial will proceed. (T. 13)

15. The defendant replied to the Court that he had not been put to plea. (T. 13)

16. The Court stated to defendant that he will be put to plea if the trial is to go forward. (T. 13)

17. The Counsel then requested a continuance of one day in order to give defendant a chance to go over the case, read the transcript, advise him, get other counsel for him, or do something to help defendant; defendant's counsel further urged that he does not feel that he can do justice to defendant; that that does not mean that defendant cannot engage other counsel who may hold views different from those of counsel; that he will try to assist defendant to engage other counsel because defendant cannot try a case of this nature by himself. (T. 14-15)

18. The Court stated to counsel that it is not allowing him to withdraw.

* * *

21. On May 16, 1967, defendant was presented at the Criminal Session of the Superior Court for Hartford before the Honorable Sidney A. Johnson, Judge, for a change of plea to an amendment to the information. (T. of 5/16/67 p. 1)

* * *

23. Defendant entered a plea of Guilty to the charge of violation of Uniform State Narcotic Drug Act and to an amended information charging defendant in the second count with larceny. (T. 5/16/67 p. 3)

24. The matter was then referred to the probation department for pre-sentence report and continued to June 2, 1967. (T. of 5/16/67 p. 3)

25. On June 2, 1967 the pre-sentence report was not ready and the matter was continued to June 16, 1967. (T. of 6/2/67 p. 1)

26. On June 16, 1967, defendant was presented for sentence before the Honorable Raymond J. Devlin, a Judge of the Superior Court at the Superior Court for Hartford County and with the defendant appeared Peter J. Zaccagnino as his counsel.

27. Attorney Zaccagnino addressed the Court stating that defendant had advised him that he has other counsel from New Haven; that he did not wish to represent defendant if defendant had no confidence in him; (T. of 6/2/67 p. 1); that Attorney Fasano was tied up in Court and is requesting a continuance of one week; that in accordance therewith, Attorney Zaccagnino moved for a continuance to Tuesday; that in view of the serious nature of the charges, defendant should have counsel of his own choosing (T. 6/2/67 p. 1); that defendant stated to Attorney Zaccagnino that he did not have confidence in his handling of the matter and that he wanted Attorney Fasano to enter the case. (T. 6/16/67 pp. 1-2)

28. The Court then inquired what other counsel could do that present counsel could not do. (T. 6/16/67 p. 2)

29. The defendant addressed the Court and stated that he was most interested in justice in this case, that he had spoken to about twenty attorneys in Hartford who were not interested in entering the case to represent the defendant and that he would get more justice by hiring out of town counsel. (T. of 6/16/67 p. 3)

30. Attorney Zaccagnino then informed the Court that defendant wanted to change his plea; that that is the reason he hired new counsel; that while this is the first heard of

it, he did suspect it because of the problem when he did enter his plea; that maybe he had been a little forceful with the defendant. (T. of 6/16/67 pp. 4-5)

31. The Court then asked defendant what he had to say and defendant stated that he would like to change his plea; that at the time he entered his plea, he had just come out of the hospital; that he had been unconscious for three days; that on the day that he entered his plea, he did not realize at the time actually, to what he was pleading; that since then, he has been a patient, taking mental examinations at the Hartford Institute of Living and that the psychiatrist had informed him that he needed psychiatry treatments (T. of 6/16/67 p. 5)

32. The Court denied the defendant's request to change his plea.

33. Defendant's acting counsel, Peter Zaccagnino represented to the Court that at the time defendant changed his plea, other pending cases were going to be disposed of on the same basis consecutive or concurrent sentences would be imposed; that he had discussed with defendant that it would be in his best interest to change his plea because he would then have no other pending matters to confront. (T. 6/16/67 p. 6)

34. The Court then inquired of Dukes what he had to say and the defendant stated that he was flabbergasted; that he was puzzled; that he is not guilty of the charges. (T. of 6/16/67 p. 7)

* * *

PART III

The following rulings were made:

44. On May 9, 1967, Attorney Peter J. Zaccagnino, who had entered an appearance on behalf of the defendant,

Charles O. Dukes, moved for permission to withdraw as counsel for the defendant and the following took place:

MR. LABELLE: This is a matter for trial, Your Honor. May a Jury panel of thirty-five be ordered? Counsel wishes to discuss some matter with me, I don't know what it is, but while recess is ordered may a jury panel be called.

THE COURT: Do you want them called down immediately?

MR. LABELLE: If they get one, as soon as we get one we'll know what we are going to do.

THE COURT: Very well, panel of thirty-five may be requested. There will be a short recess.

LATER:

MR. ZACCAGNINO: If it please the Court, Your Honor, on this matter that is now pending before the Court, State of Connecticut versus Charles Dukes, between last night and this morning, Your Honor, we have had a number of conversations with Mr. Dukes, and I think that I am going to petition the Court to formally withdraw from this case because there happens to be a slight conflict between my client and myself, and it's not financial, Your Honor, it is one basically that goes to the heart of my representing him, and I think, Your Honor, in fairness to the defendant, he hasn't been put to plea as yet, and this case has just been bound over three or four weeks ago, it's a very recent arrest, that in good conscience and in order for this man which is a very serious charge, as Your Honor knows, that I think — he tells me this morning that he wants to represent himself and he so wants to represent that to the Court, and in the recess I told him the foolishness of his ways, to try a jury case by himself.

However, I don't know what his opinion is right now, but he also tells me he may get additional counsel. I don't know what the Court's position is on that. I'm going to ask Your Honor, if Your Honor wants me to put it in writing I will, to withdraw. The defendant is here, and, Your Honor, he has full knowledge of this and wants to represent to the Court that is so. We do have this difference that may go to the heart of my representing him.

I know Mr. LaBelle is opposing my withdrawing at this date, but as I say to the Court the man has not even been put to plea as yet and it seems to me that the motion should be granted because of the very basic position of an advocate in behalf of a defendant who he must believe in the cause in which he is speaking for in many ways and there are some things here that we have a disagreement on with respect to the matter which may in some way prejudice the defendant. I just think he should have at least -- the trial should be conducted in such a manner where I don't feel as his attorney perhaps something he is doing is wrong. That is the whole issue, if Your Honor please. Not wrong with respect to the arrest, I'm not talking about that, but actually the trial, the conduct of same.

MR. LABELLE: Well, if other counsel appears, Your Honor, ready to go to trial today, I have no objection to the withdrawal. Until other counsel appears it seems to me there isn't any basis to withdraw. We are ready to try the case today. (T. of 5/9/67 pp. 1, 2, 3)

Now the next thing is, Your Honor, that the defendant now wishes to address the Court, Your Honor, on the matter which I spoke to Your Honor about, and I would just like to say this to the Court —

THE COURT: He hasn't been put to plea.

MR. ZACCAGNINO: No, he hasn't been put to plea yet, Your Honor, and that is the issue here is about my motion to withdraw, that I understand Mr. LaBelle's position is the reason for his particular position but I also understand, Your Honor, this defendant's position because it's an unusual situation, Your Honor, on a case that is so new that the same day of plea that you go to trial. I agree Mr. LaBelle called me on Monday. He said he called me earlier, I'm sure he did. If he said he called me he must have called my office. I wasn't there. And he told me to be ready but it's an unusual circumstance when they tell me to be ready and the man hadn't pled, I took it he's got to be ready to plead on Tuesday morning. I knew it was going to be a trial and so advised the defendant. I've been waiting to address the Court because the Court has been busy on other matters. He tells me he either wants to represent himself or get counsel outside of the county that he can have more confidence in for some reason or other. Now I don't know what the reason is but he would like to address the Court before he is put to plea so he has the right to counsel. If he is not going to have that right of other counsel to get somebody to represent himself then I think, Your Honor, whatever he wants to say I'd like to have him address the Court because if Your Honor grants my motion he'll be without counsel for the moment. Do you want to address the Court?

THE ACCUSED: Judge, Your Honor, I'd like to ask the Court —

THE COURT: I can't hear you.

THE ACCUSED: I'd like to ask the Court several questions.

THE COURT: I still can't hear you.

MR. ZACCAGNINO: Speak up.

THE ACCUSED: I'd like to ask the Court several questions to be permitted. Number one, I would like to ask for the prosecutor of this particular case to withdraw from the case because if I try the case, I intend to cross-examine him concerning this case and I'm afraid it's going to cause a conflict of interest. I don't think it would be fair to the accused.

MR. LABELLE: If Your Honor please, this man is not going to run this court as long as I have anything to say to the Court about it. He knows that this case is ready to go to trial and counsel also knew this as long ago as at least a week because his office was notified by my office on several occasions during the middle of last week, Wednesday and Thursday.

Now if this man wants to try his own case let him try his own case and let counsel sit with him and advise him if he wants to try his own case. And if he has other counsel he wants to get in place of Mr. Zaccagnino then Mr. Zaccagnino can leave but as far as the State is concerned we are ready to go to trial and this story about him going to cross-examine me in this case is news to me. I don't intend to be a witness so I don't think he's going to cross-examine me.

THE COURT: Well, we'll take that matter up if and when we try the case. What is your next point?

THE ACCUSED: Number two, Your Honor, with local counsel I am afraid, well, I know there is going to be resentment. I have reasons to believe that through conversations, and I'd like the opportunity to hire an attorney from another state that don't have no knowledge of the case, of this specific case. Otherwise I feel as though that is the reason that I intend to try my own case in the event that the Court doesn't grant it.

THE COURT: You wish to try the case yourself, is that it?

THE ACCUSED: If the Court doesn't grant me opportunity to hire an attorney out of the State, sir, because I don't want no resentment upon any attorneys, local attorneys.

THE COURT: Well, at this time it's rather late to bring that in. The State says it's ready for trial. You were notified for trial so we will proceed with the trial. Whether or not I will allow counsel to withdraw is another thing.

THE ACCUSED: Yes, sir, I haven't even been put to plea on this.

THE COURT: Well, you'll be put to plea if we go forward.

THE ACCUSED: Well, that's all at the present time. Thank you. (T. of 5/9/67 pp. 10, 11, 12, 13)

* * *

THE COURT: Well, I think what we will do is present him for plea, give him the opportunity, then we won't present any evidence today but we'll pick a jury today and I will hold you in attendance, counsel.

MR. ZACCAGNINO: If Your Honor pleases, is Your Honor instructing me that —

THE COURT: I'm not allowing you to withdraw at this time.

MR. ZACCAGNINO: At this time I don't know whether, Your Honor, it meets with this man's approval, because it may Your Honor —

THE COURT: He says he wants to defend himself.

MR. ZACCAGNINO: Yes, Your Honor. I think he does want to defend himself as opposed to me representing him in the matter. I don't know. If it meets with his approval I suppose he has a right to defend himself.

THE COURT: He'll be entitled to ask questions of the jurors, of the panel, if he wishes, and then we will go to trial on the factual issues tomorrow. Would you like a short recess?

MR. ZACCAGNINO: Yes, Your Honor. Excuse me. I think it might be helpful.

(Short recess.)

LATER:

THE COURT: First, do you want to present the person for plea, counsel?

MR. LABELLE: Yes, May he be put to plea, Your Honor.

THE COURT: Put him to plea and election.

MR. ZACCAGNINO: We'll waive the reading of the information.

MR. O'BRIEN: Charles O. Dukes, how old are you?

THE ACCUSED: Thirty-two year old.

MR. O'BRIEN: Charles O. Dukes, the State of Connecticut charges you with violation of the Uniform State Narcotic Drug Act. How do you plead?

THE ACCUSED: Not guilty.

MR. O'BRIEN: Do you elect a trial by Court or by Jury?

THE ACCUSED: By jury of twelve.

THE COURT: Very well. (T. of 5/9/67 pp. 1, 2, 3, 10, 11, 12, 13, 15, 16)

* * *

45. On May 9, 1967, the defendant moved that the matter be continued to the following morning and the following took place:

MR. ZACCAGNINO: If Your Honor pleases, I just might like to say one thing in conclusion. I think this man has other counsel besides myself involved in another matter, and I realize that the Court is being tied up, but I think in view of the seriousness of the matter, in view of my position, I was going to ask for a continuance till tomorrow morning and two things may occur.

One, it may be that my position, I might be able to convince my client of. If I can't at least he will have overnight to get counsel. I think it's not an unreasonable delay of the court because the issues involved are far more serious than any inconvenience in this instance to the court. I realize this is inconvenient. I realize Mr. LaBelle told me this but between last night and this morning a great change of position has taken place between my client and I in the matter so in view of that this is something we didn't plan to delay the court, it just came about and I know one thing being part of the case that I can't see any justification, Your Honor, for not allowing that time till tomorrow morning because it may be if it doesn't develop like I would like it to develop at least this man will have a chance to go over this case, read the transcript with me, I'll advise him, get other counsel here or do something to help him. I don't hold any plea for delay of the court. I sat here for three days

waiting for the court to be open to get to this point. I've been here Tuesday, Wednesday and Thursday. I didn't do anything in my office all three days. I say to Your Honor I have been here. I don't think I have unduly delayed the court and I don't think this man has. I think we have come now to the position where Your Honor has to decide that with respect to this because I don't feel Your Honor that I can do this man justice in this particular issue and that doesn't mean that he can't get other counsel to feel differently than I do. I think he should have at least tomorrow morning. I don't think that is too much delay. I don't see the great pressure of one day when a man hasn't been put to plea. It's the first case I have had in this court where the man has been put to trial on the same day of plea. I do think it wouldn't inconvenience the court. I feel very uneasy about the situation I am presenting to the court, Your Honor, and I don't know that it might not resolve itself. I don't think I can resolve it but I do feel he should have this overnight. If he can't get other counsel I'll assist him in trying to get him other counsel because I don't think a man can try a case of this nature by himself.

MR. LABELLE: Of course that is a matter of the court's discretion, Your Honor. We are prepared to go forward today and the court might wish to consider in deciding this matter whether or not a jury if it is going to be a jury trial could be picked and testimony started tomorrow.

* * *

46. On June 16, 1967, the defendant through Mr. Zaccagnino, his counsel of record, stated to the Court that the defendant had advised counsel of record that he had engaged other counsel to represent him and that other counsel was elsewhere engaged and defendant requested a continuance for one week. The Court denied the motion and the following took place:

MR. LABELLE: 28358, Charles Dukes.

MR. ZACCAGNINO: If Your Honor please, prior to this man being sentenced in this particular matter, I discussed this momentarily with Mr. LaBelle. Mr. Dukes has advised me that he has other counsel from New Haven; Mr. Fazzano, who is representing him, and I don't intend in any way to delay the Court. I thought, if he has other counsel, I have no objection to getting out. In fact, I do not want to represent Dukes if he doesn't have any confidence in me. But Fazzano was tied up, Attorney Fazzano was tied up this morning and is requesting a continuance for a week, and I told Mr. Dukes the most I would do for him would be to put the motion to the Court and suggest it be continued until Tuesday. I think this, Your Honor, that if he has other counsel and because of the serious nature of the charges, that he should have counsel of his own choosing. If he has no confidence in me, I don't resent it personally. I understand his position. But I do feel that this is a very serious situation, and Mr. LaBelle wants to proceed this morning with sentencing. I don't quarrel with Mr. LaBelle on that point. I want to state my position to the Court so that Your Honor will know what his position is. He told me this morning that he felt that he didn't have confidence in my handling the matter, and he wanted Mr. Fazzano to come in, if that is the situation, Your Honor, as I say, I don't have any personal feeling on it, but I suppose there can be no — you know, I can't represent a man that — or if he doesn't have confidence in me is what I want to say. If he feels he wants Attorney Fazzano, I would like to state to the Court I have no objection; and as a matter of fact, I welcome it. I don't want to be dilatory because this man comes up this morning and he tells me he has another lawyer, but I feel it is so serious I don't know what to tell Your Honor except to tell Your Honor that I should be relieved as counsel when Mr. Fazzano —

THE COURT: What could other counsel do that you couldn't do?

MR. ZACCAGNINO: I don't know, Your Honor; but I do say this: That it's become a situation, Your Honor, that I can't quite understand either, and he feels, and I stated his position to Your Honor, so that Your Honor knows. And if he has anything he wants to say to your Honor, I suppose he ught to say it to you. I have said what I have got to say.

THE COURT: What do you want to say, Dukes?

THE ACCUSED: Well, I was —

THE COURT: I can't hear you. Speak up.

THE ACCUSED: I was most interested in justice in this case, and I spoke to maybe about twenty attorneys from Hartford, and nobody seemed to want to take the case, represent me, and it would be more justice to get more justice by hiring an attorney out of town, which I brought this out before certain reasons.

THE COURT: Well, you have a good attorney now. What is the objection to that?

THE ACCUSED: Well, I would rather have an attorney out of town for certain reasons of the case. Your Honor, sir —

THE COURT: Well, I think we ought to go on with it today.

MR. LABELLE: There has been no appearance.

THE COURT: No appearance been filed.

MR. LABELLE: It is my understanding from Mr. Fazzano, who called my office this morning, called one of the

detectives, that he was just contacted last night. He doesn't know Dukes or anything about the cases. Now, no appearance has been entered. It is simply a disposition. It isn't a trial, and I don't see there is any reason for delaying it further. He's had plenty of opportunity when he was put to plea in this matter, and the court specifically asked him before he accepted the plea whether or not he was satisfied with his counsel. And at that time the plea was accepted, he indicated to the court that he was. I ask that the sentence be imposed in 28358.

THE COURT: The sentence will be imposed.

(T. of 5/16/67 pp. 1, 2 3)

* * *

47. On June 16, 1967 before the Honorable Raymond J. Devlin, a Judge of the Superior Court, the defendant moved for a change of plea which the Court denied and the following took place:

MR. ZACCAGNINO: He tells me now, Your Honor, he would like to change his plea, and I thought Your Honor would like to know that. I don't suggest that to the Court. He suggests it, and that is the reason he hired new counsel, and this comes as a surprise to me. This is the first I heard of it, but I had a suspicion, Your Honor, that this may take place because of the problem when he entered the plea. I was maybe a little forceful. However, Your Honor, it was all discussed with him, and he does feel, Your Honor, that the reason he went out of the county was because no lawyer would properly represent him in this matter in this county. I don't believe that, because I put a lot of hours in this case. However, he does tell Your Honor now that he does want to change his plea, and he better say it himself, because Your Honor better talk to him about it.

THE COURT: What do you want to say?

THE ACCUSED: Yes, Sir; I would like to change my plea, Your Honor. At the time I plead, I just came out of the hospital, I think it was a day, and I was unconscious for three days, and I didn't realize at the time actually what I was pleading to. And since then, I am a patient, taking a mental examination at the Hartford Institute of Living and also Dr. Harold, a heart specialist, and she said that, the psychiatrist said that I needed psychiatry treatments.

THE COURT: I will deny the motion.

MR. LABELLE: Your Honor has his record here, and I would simply say he's, so far as I am aware of, been involved in criminal activities in this county for a substantial period of time; and on the case, I would suggest by way of disposition on the first count not less than five no more than ten years in the State's Prison. On the second count, two years, making an effective sentence of not less than five no more than twelve years.

THE COURT: All right.

MR. ZACCAGNINO: Your Honor, it puts me at a slight disadvantage, but I will tell this to the Court: That at the time that he changed his plea, Your Honor, that some of these cases, Your Honor, were very tenuous at best, and it is my understanding that all of the matters were going to be disposed of on the same basis, consecutive or concurrent sentences would be imposed. I think this, Your Honor, that to sentence this man on one of these counts and for all of them, the reason, I induced him, I didn't induce him, I discussed with him his best possible interest to change his plea because he had so many matters pending. Now, proceeding on two matters, and all these matters are pending, I feel that if Your Honor does accept the recommendation, which is the five to

ten on the sentence, the minimum or the maximum on the narcotics case, he will have great additional time, and I don't know what to tell Your Honor other than the fact I wish Your Honor would make a note for the record, in the event I can talk to Dukes, that Your Honor does have knowledge of these other situations, these other crimes which are of a similar nature and of a weaker nature, and I would say to Your Honor the only thing in defense of Dukes, I realize his record is bad and his activities have been bad; however, when he changed his plea and entered his plea of guilty, he saved the State considerable cost and expense and time, because I think about five or six cases pending against him, they only had one or two cases that were of a strong nature, and I do think, Your Honor, that I feel having been his counsel, that I should make this fact known to Your Honor that it was a matter that Your Honor would normally, under normal circumstances, in a situation like this, enter concurrent sentences, if, in fact, it was so recommended by the State's Attorney; but since he doesn't want to plea to these other matters, I would like to make that note for the record, because I feel at some later date he may have to come back to this court and see Your Honor or see another judge on these other matters now pending before it.

THE COURT: What do you want to say, Dukes?

THE ACCUSED: I am rather flabbergasted really, because I didn't expect this this morning. It just puzzles me. I am not guilty of the charges. I am not guilty.

(T. of 5/16/67 pp. 4, 5, 6, 7)

PART IV

* * *

The defendant made the following claims:

48. On May 9, 1967, before the Honorable Sidney A. Johnson, a Judge of the Superior Court, the defendant's re-

quest for the withdrawal of counsel of record on behalf of the defendant to be replaced by additional counsel of the defendant's choice at the expense of the defendant because there existed a conflict between counsel of record and the defendant which goes to the heart of the representation of the defendant by counsel of record.

49. That the disagreement between counsel of record and the defendant was one which may prove prejudicial to the defendant if counsel of record is not permitted to withdraw his appearance.

50. That the defendant should be given an opportunity to engage other counsel and the matter continued for that purpose in view of the seriousness of the charges and in view of the fact that there would be no unreasonable delay or any inconvenience to the Court and further, in view of the fact that counsel of record understood that he was to present the accused for plea and not for trial.

51. That it was unreasonable to expect the defendant to proceed with the trial on the day he entered his plea in the light of all the circumstances and the seriousness of the charge.

52. On June 16, 1967, counsel of record requested and moved for a withdrawal of his appearance because the defendant had advised counsel of record that he had engaged other counsel who was not able to be present that morning due to another engagement and requested a continuance of the matter to the following Tuesday; that because of the serious nature of the charges, the defendant should have counsel of his own choosing and a reasonable continuance.

53. That on June 16, 1967 the defendant moved for a change of plea urging that when he entered his plea, he was forcefully prevailed upon to do so; that he had just come out

of the hospital where he had been confined in an unconscious condition for three days; that he did not realize at the time the plea was entered, to what defendant was pleading; that he is a patient taking mental tests at the Hartford Institute of Living and that he was in need of psychiatric treatments.

The Court denied each of the defendant's motions and overruled his claims of law.

Defendant,
By ALPHONSE C. FASANO
His Attorney

Filed August 1, 1967.

Finding

First

The following facts are found:

1. The accused was arrested in Hartford and charged with a violation of the Uniform State Narcotic Drug Act and receiving stolen goods.

2. After a hearing in probable cause on April 17, 1967, the defendant was bound over to the Superior Court on the narcotics charge and on the receiving charge. (Tr. pp. 1, 2)

3. The law firm of Zaccagnino, Linardos & Delaney appeared on behalf of the defendant in the Superior Court.

4. Counsel for the defendant was notified on Monday, May 1st, that the case was ready for trial, and was advised to be ready for trial. (Tr. p. 10)

5. The defendant knew that the case was ready for trial, and his counsel, Peter J. Zaccagnino, Jr., was present in court

awaiting trial on Tuesday, May 2nd, Wednesday, May 3rd, and Thursday, May 4th. (Tr. p. 14)

6. The case was reached for trial on Tuesday, May 9, 1967. (Tr. p. 13)

7. On May 9, 1967, John D. LaBelle, State's Attorney for Hartford at the Superior Court for Hartford County at Hartford, before the Honorable Sidney A. Johnson, a Judge of the said Superior Court, presiding at the Criminal Session of said court, stated to said court that the case of State v. Charles O. Dukes, case no. 28358 was ready for trial and requested a jury panel of 35 be ordered. (T. 1)

8. Charles O. Dukes, the defendant, was represented by Peter J. Zaccagnino, Jr., who was acting as defendant's attorney (T. 1)

9. Following the request of the State's Attorney made to the court for a jury panel, the State's Attorney advised the court that the defendant's counsel wished to discuss some matter with him, the nature of which he was not aware. (T. 1)

10. The court ordered that a panel of 35 jurors be supplied and declared a recess.

11. Following the recess, the court came into session (T. 1)

12. When the court reconvened, counsel for the defendant, Peter J. Zaccagnino, Jr., told the court that he thought he was going to petition the court to withdraw from the case since there happened to be a slight conflict between him and his client because his client told him he wanted to represent himself. (Tr. p. 2)

13. Counsel also told the court that his client had told him that he might get additional counsel. (Tr. p. 2)

14. Thereafter, counsel argued to the court concerning his Motion to Quash the information, his Motion for a Bill of Particulars, and his Motion to Suppress the evidence. (Tr. pp. 6-10)

15. After the motions were argued and decided, the defendant addressed the court and told the court that he was afraid that there was going to be resentment if he had local counsel. (Tr. p. 12)

16. The defendant then told the court that he would like the opportunity to hire an attorney from another state. (Tr. pp. 12, 13)

17. The defendant told the court that if he did not have an opportunity to hire an attorney from another state, that he would then like to try his own case. (Tr. p. 12)

18. Counsel for the defendant then requested a continuance of the trial until the next day, May 10th. (Tr. pp. 13, 14)

19. Thereafter, the defendant was put to plea and pleaded not guilty and elected a trial by a jury of twelve. (Tr. p. 16)

20. Counsel requested the court to continue the case to May 10th, the next day, in order for the defendant to get other counsel or to represent himself. (Tr. p. 17)

21. Counsel also advised the defendant and the defendant acknowledged that he understood that the case was to go forward for trial the next day, May 10th. (Tr. pp. 17, 18)

22. When the court continued the case to May 10th, the court asked the defendant if he understood that he was to proceed to trial the next morning and the defendant told the court that he understood that. (Tr. p. 18)

23. On May 10, the case was continued to May 16, for trial. (Tr. p. 1)

24. On May 16, the defendant appeared with Attorney Robert C. Delaney, a member of the firm of Zaccagnino, Linardos & Delaney, and requested permission of the court to change his plea to the information. (Tr. pp. 1, 2)

25. The court was requested by the State's Attorney to make inquiry of the defendant with respect to representation by counsel since there had been prior indication that counsel had asked to withdraw from the case. (Tr. p. 2)

26. Thereafter, the following occurred:

THE COURT: Well now, Mr. Dukes, I want to be sure that everything is in order here. I was present the other day, of course, when you were presented and the problem came up about an attorney. Now I want, now Mr. Delaney is here, are you fully satisfied with the services he is rendering you, Mr. Dukes?

THE ACCUSED: Yes, sir.

THE COURT: You are. And now you know, of course, Mr. Dukes, that — you know of course that the State of Connecticut has the burden of proving you guilty on the charge and you are free to go to trial but you still wish to change your plea, is that correct?

THE ACCUSED: Yes, sir.

THE COURT: And you know the probable consequences of it?

THE ACCUSED: Yes, sir.

THE COURT: Very well, and no one has induced you to

do this, influenced you one way or the other? You are doing this of your own free will?

THE ACCUSED: Yes.

THE COURT: Very well then. We will accept the change of plea.

ASSISTANT CLERK JOEL ELLIS: Mr. Dukes, how old are you?

THE ACCUSED: Thirty-two years old.

MR. ELLIS: Do you waive reading of the information?

MR. DELANEY: We will waive the reading.

MR. ELLIS: To the charge of violation of Uniform State Narcotic Drug Act what is your plea?

MR. DUKES: Guilty, sir.

MR. LABELLE: May we have the plea to the amendment also?

MR. ELLIS: Do you waive reading of the amended —

MR. DELANEY: Waive reading of the amended information.

MR. ELLIS: In the amended information you are charged in the second count with larceny. What is your plea to that count?

THE ACCUSED: Guilty, sir.

THE COURT: Both pleas are accepted.

MR. LABELLE: May these matters be referred to the probation department for pre-sentence report, your Honor.

THE COURT: June 2nd.

MR. LABELLE: And may they be assigned disposition?

THE COURT: They've got quite a few, I understand, for the 26th.

MR. LABELLE: May it be June 2nd.

THE COURT: June 2nd, and continued under the same bond.

MR. LABELLE: The bond in the case is twenty thousand dollars.

THE COURT: Very well. Pre-sentence investigation is ordered, sentencing for June 2nd on the same bond.

MR. DELANEY: Thank you, your Honor.

27. On June 2, 1967, the defendant appeared in court before the Hon. Raymond J. Devlin, and Attorney Zaccagnino appeared with the defendant on that day. (Tr. p. 1)

28. The following occurred:

MR. ZACCAGNINO: If your Honor pleases, this was set down in the other courtroom before Judge Johnson this morning, and Mr. Capshaw is still working on the report, and they tell me, I find through Dukes, they need another two weeks in which to finish it. Mr. LaBelle asked me to have the case called here because Judge Johnson is handling divorce matters.

I would also say that all the matters we have asked for consolidation haven't come in, so we'd need a continuance for that purpose anyway.

MR. SILVESTER: June 16th, if your Honor pleases, under the same bond?

THE COURT: June 16th. Same bond.

MR. ZACCAGNINO: Thank you, your Honor.

29. On June 16, 1967, the defendant was presented for sentence before Hon. Raymond J. Devlin. (Tr. p. 1)

30. At that time Attorney Zaccagnino appeared with the defendant. (Tr. p. 1)

31. The defendant indicated to the court that he had consulted other counsel. (Tr. p. 1)

32. Other counsel had been contacted the night before. (Tr. p. 3)

33. No other counsel had entered any appearance on behalf of the defendant. (Tr. p. 3)

34. The defendant did not tell his own counsel about consulting other counsel until the morning of June 16. (Tr. p. 2)

35. No other counsel filed any appearance on behalf of the defendant until June 22, 1967. (File)

36. The defendant requested permission to withdraw his plea of guilty which request the court denied. (Tr. p. 5)

37. The defendant had not told his counsel that he wished to change his plea until he made the request to the court. (Tr. p. 4)

38. No exception was taken to the denial. (Tr. June 16)

39. The defendant requested a continuance until the following Tuesday which the court denied. (Tr. p. 3)

40. No exception was taken to the denial. (Tr. June 16)

41. During the period between May 16 and June 16, the defendant had requested that charges against him from other counties be consolidated in Hartford County under General Statutes, § 54-17a. (Tr. p. 1; pp. 4, 6, 7; file)

42. No evidence was offered by the defendant in connection with any of his motions. (Tr. June 16)

43. The defendant did not offer any medical evidence to support his motion to change his plea and no medical evidence was attached to the probation report although the probation officer requested the defendant to furnish medical reports. (probation report)

44. The defendant did not make any motion in arrest of judgment before sentence was imposed or at any other time. (file)

45. The defendant did not make any motion to open the judgment or to vacate the sentence. (file)

46. The probation report is hereby made a court exhibit.

47. The probation report was delivered to counsel for the defendant and to the court prior to June 16. (probation report)

48. The probation report had been read by the court prior to June 16.

49. The defendant is experienced in criminal matters and is experienced in court appearances to answer to criminal charges. (probation report and criminal record; Tr. pp. 5, 6)

50. There were several other criminal charges pending against the defendant in Hartford County, New Haven County and Fairfield County at the time he was sentenced. (probation report and criminal record)

51. The defendant was involved in narcotic drug traffic in Hartford. (probation report)

52. The case was submitted to the court for sentencing on an agreed recommendation. (Tr. pp. 4, 5, 6; Tr. pp. 1, 2)

53. The defendant was sentenced to not less than 5 nor more than 10 years on the narcotics count and to two years on the larceny receiving count.

54. The defendant was free on a bond of $20,000 during all the proceedings in this case. (probation report, file, Tr. p. 4)

55. Other than the defendant's request to change his plea again, no complaint was made to the court about what had previously occurred before Judge Johnson.

Second

The following conclusions have been reached:

56. The defendant before June 16 at the time the case was ready for trial had already changed his plea from not guilty to guilty.

57. The change of plea to guilty on May 16 was the free and understanding expression of his own wishes.

58. The defendant had from May 16 to obtain other counsel and to notify the court of his desire to change counsel.

59. The defendant had told the court on May 16 on specific inquiry that he was satisfied with his counsel.

60. The defendant appeared in court on June 2, and did not in any way indicate to the court that he desired to change counsel or that he desired to change his plea.

61. The defendant did not act in good faith with respect to seeking other counsel.

62. The defendant did not notify the court between May 16 and June 16 that he desired to change his plea.

63. His counsel was surprised on June 16, at the defendant's request to change his plea. (Tr. p. 14)

64. On June 2 the court was advised that the defendant was awaiting transfer of charges from other counties that he had requested be consolidated, and the defendant knew that under the statute allowing this, the defendant is required to plead guilty to all the charges from all the counties.

65. The court in its discretion may allow a change of plea when it is fair and just to do so.

66. No credible evidence was introduced by the defendant to support the granting of a change of plea.

67. The defendant at the time of sentencing requested to change his plea for the purpose of delaying sentencing.

68. It would not be fair and just under all the circumstances to allow the defendant again to change his plea, having in mind the seriousness of the offenses, the conduct of the defendant, and the protection of society.

69. At the time the plea of not guilty was changed to guilty the court before accepting the plea carefully ascertained that the plea of guilty was voluntarily made, without any mistake by the defendant, allowed an amendment to be filed with the defendant's consent, and determined that the defendant was fully aware of the possible consequences of his guilty pleas.

70. The sentence imposed was within the limits fixed by the statutes for the offenses charged.

Third

71. Defendant made no claims of law.

Fourth

72. The probation report is made a part of the finding and may be used in argument before the Supreme Court without being printed.

DEVLIN, J.
JOHNSON, J.

Filed February 27, 1968.

Assignments of Error

1. In finding the facts set forth in Paragraphs 4, 5, 13, 22, 23, 41, 49 and 50 of the Finding without evidence.

2. In finding the facts set forth in Paragraphs 33, 34, 35, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, and 55 of the Finding because such facts are not material facts relevant to the issues raised by this appeal relating to the denial of the rights of the appellant under Articles Fifth, Sixth and Fourteenth, Amendments to the Constitution of the United States.

3. In finding the facts set forth in Paragraphs 43, 46 through 51 and 54 of the Finding because such facts are based upon a probation officers presentence investigation and are immaterial and irrelevant to the rulings of the Court made on May 9th, May 10th and June 16th, 1967 and because the function of such probation officer's presentence investigation report is to aid the Court in the imposition of a fair and just sentence after all legal rights of an accused have been exhausted or determined.

4. In refusing to find the material facts set forth in Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the Finding which were admitted or undisputed.

5. In reaching the conclusions stated in Paragraphs 57, 58, 61 and 63 to 69 inclusive of the Finding.

6. In reaching the conclusion and stating that the defendant made no claims of law as stated in Paragraph 71 Part III of the Finding.

7. In refusing to find and make part of the record Paragraphs 44 to 47 inclusive, Part III of the Draft Finding relating to the rulings made by the Court which rulings are admitted or undisputed.

8. In refusing to find Paragraphs 48 through 53 inclusive, Part IV of the Draft Finding relating to the claims and motions made by the defendant which claims of law and rulings on motions were admitted or undisputed.

9. In finding that the probation report made be made a part of the Finding and may be used in argument before the Supreme Court as stated in Part IV, Paragraph 72 of the Finding because such probation report is irrelevant and immaterial to the question of whether the constitutional guarantees of the appellant under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States had been violated prior to the imposition of sentence and because such improper use of the probation report is prejudicial to the rights of the appellant.

10. In rendering a judgment of guilty as on file.

11. In refusing to grant the motions of counsel of record for permission to withdraw.

12. In refusing to accept the request of counsel of record to withdraw as counsel for the accused in the light of the disclosure made by counsel of record to the Court that there existed a conflict between himself and the accused which difference may go to the heart of his representation of the accused.

13. In ordering the defendant to trial without proper representation for the accused.

14. In ordering the accused to stand trial under circumstances in which the accused was to conduct the trial of his own case.

15. In accepting the plea of guilty and in rendering a judgment of guilty after the accused had informed the Court that he was not guilty and after he had advised the Court of the circumstances under which he pleaded guilty.

16. In depriving the accused of his Constitutional Rights under the Fifth, Sixth and Fourteenth Amendments.

The Defendant
CHARLES O. DUKES
By: ALPHONSE C. FASANO
His Attorney

Filed March 7, 1968.

No Corrections.
3/14/68
DEVLIN, J.

Amendment to Assignment of Errors

The defendant Charles O. Dukes amends Paragraph 4 of the Assignment of Errors to insert the word "draft" before the word "finding" which word was inadvertently omitted at the

time the Assignment of Errors was filed, so that Paragraph 4 will read:

4. In refusing to find the material facts set forth in Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the Draft Finding which were admitted or undisputed.

The Defendant
CHARLES O. DUKES
By: ALPHONSE C. FASANO
His Attorney

Filed April 8, 1968.

SUPREME COURT
HARTFORD COUNTY } CLERK'S OFFICE

The above and foregoing is a true copy of the record in said case to be used in the trial in the Supreme Court.

Attest: DOMINIC A. DiCORLETO
Clerk

TRANSCRIPT OF TESTIMONY, HABEAS CORPUS

STATE OF CONNECTICUT
No. 161335

CHARLES DUKES	}	SUPERIOR COURT
V.	}	HARTFORD COUNTY
WARDEN	}	NOVEMBER 5, 1969

BEFORE: HONORABLE IRVING LEVINE, JUDGE

APPEARANCES:

JAMES A. WADE, ESQ.
Attorney For The Plaintiff

JOHN D. LABELLE, ESQ.
State's Attorney, For The Defendant

PETER J. ZACCAGNINO, JR., called as a witness, having been duly sworn, was examined and testified as follows:

CLERK OF THE COURT: Would you please state your full name and address?

THE WITNESS: Peter J. Zaccagnino, Jr., 374 Campfield Avenue, Hartford, Connecticut.

DIRECT EXAMINATION BY MR. WADE:

Q. Your occupation, Mr. Zaccagnino? A. I'm an attorney, practicing in Hartford.

Q. And how long have you been an attorney, sir?

A. I think it's nineteen years — eighteen years, I believe. Wait a minute, it's 1952, seventeen years.

Q. Would you tell us who the members of your law firm are? A. Yes. I have two partners, Robert Delaney, George Linardos, and I have Robert Blechman (phonetic) as an associate in our office. We have four lawyer.

Q. Would you describe generally the type of practice that your law firm engages in? A. Well, Mr. Delaney and myself devote ourselves to the criminal business. The others are on the civil side. We devote ourselves almost entirely to the criminal business.

Q. Do you know the petitioner, Charles Dukes?
A. I know Charles Dukes very well.

Q. And was Charles Dukes a client of yours in May of 1967? A. Yes, he was.

Q. Would you tell us how he came to you as a client, initially? A. Well, the first time he came to me, I think I was trying a case in the Hartford Circuit Court, which I won, and he saw me trying the case, and he said he wanted me to represent him on a matter. I think that's the first time I bumped into Charlie, where he asked me about this particular case.

Q. And did you have discussions with Mr. Dukes about this particular case? A. Yes, I did.

Q. In your office? A. In my office, in the Courtroom when he saw me, and I suppose in the Superior Court, too, beforehand. I remember talking to him on occasion. I don't remember just where.

Q. Now, at that point in time, was Mr. Dukes out on bond? A. Yes, he was out on bond.

Q. Now, did he indicate to you, prior to May 9, 1967, did he indicate to you which way he wanted to plead on

the charges then pending against him? A. Well, he wanted to plead not guilty, and it was my feeling, from my judgment of the case, that I was trying to persuade him to plead guilty to wipe up some matters that were pending, and I told him that I thought he ought to enter a guilty plea, and his conversation with me was that he wanted to plead not guilty, and I told him in his best interests, he should enter a guilty plea, because I remembered Mr. LaBelle reminded me, I looked at the file of something, I remembered reading the file, but there were other warrants outstanding and other matters pressing, which bring it in focus that for his best interests, I was trying to convince him to take a guilty plea.

Q. And these suggestions that he take a guilty plea, were they over a period of some time? A. Well, I had — in my opinion, in his best interests, I applied a little pressure on him to take a guilty plea, because I thought it was in his best interest, because he had a number of warrants pending against him.

Q. Now, leading up to the date of May 9th, do you recall appearing in Superior Court before Judge Johnson with Mr. Dukes? A. Yes, at that time, because of the fact that I felt that he should take a guilty plea, and he felt he should take a not guilty plea, I thought there was, you know, a conflict between our positions, and I told Charlie, I said Charlie, I think you better get another lawyer, because I don't think I can represent you, you feeling one way and I feeling another way, because my experience in this field tells me that you should enter a plea, and that's when we came to pass, in the first time.

Q. All right. Now, this May 9th appearance in Superior Court, was this the first appearance in Superior Court in connection with this case, on behalf of Dukes?

A. I don't know, but I know it was — it might have

been the first time for me, because I discussed the case with the State's Attorney a number of times prior to that, but as a matter of fact we had a number of conversations, but it may be my first Court appearance. I suspect it was. I don't have any definite recollection.

Q. The record indicates that he was put to plea on the 9th of May. A. Well, I assume that that's correct, and I'd say that that's the first time it was brought into Court. I'm certain it probably was.

Q. Now, after the dialogue that took place in Court on the 9th of May, when was the next time you saw Mr. Dukes? A. Well, it was a couple of weeks later, because in between that time, I had seen Charlie perhaps back and forth around the Courtroom. I don't know if I did. I don't have a definite recollection at this time that I saw him. But I know I was at the sentencing when it came up for sentencing.

Q. All right. Did you talk to Mr. Dukes yourself between the 9th of May and the 16th of May, and to refresh your recollection, the 16th of May, the record indicates as the date that he plead guilty. A. Did I talk to him between that time?

Q. Yes. A. I don't know. I'm sure I might have, because it was during that period that I was trying to persuade him to take a guilty plea, and I don't know if I did or not. I know that Mr. Delaney did talk with him.

Q. All right. Now, I'm going to come to that next. The record indicates that on May 16th, Mr. Delaney appeared in Superior Court with Mr. Dukes, and at that time he entered a plea of guilty. Now, the question that I have for you is did you and Mr. Delaney discuss the disposition, or what action should be taken on behalf of your client, Mr.

Dukes? A. Oh, I'm sure we had a number of discussions, and in refreshing my recollection this morning, we were coming up, we happened to be talking about — we didn't know what was going to be discussed, but I know that I had a number of discussions with Mr. Delaney, and both of us said, try to convince him that it was in his best interest to take a guilty plea, and I think that Mr. Delaney and I had some conversation about it, and I might have been on trial — it's my best recollection I was on trial, and that's why Bob Delaney handled the case the actual time that he changed his plea, rather than myself.

Q. As far as you are concerned, was Mr. Dukes still a client of your law firm? A. Well, he had paid me, let me put it that way, and I assumed that he was still a client of ours. I would say yes, he was a client of ours, because I had no understanding that he wasn't. I had made the formal offer to withdraw, and I would state in the case, as I recall, Mr. Fazzano, or somebody that he had mentioned in New Haven, that he was going to bring up as his counsel, was going to come in.

Q. Now, I take it you had entered an appearance slip?
A. Oh, we had an appearance in the file, yes.

Q. And in whose name was that appearance?
A I' would be the firm appearance, normally. I can't recall, ..t I know that I always enter firm appearances, because both Mr. Delaney and myself get involved in all the cases that we are involved in over there.

Q. Now, you say that during this period from the 9th of May to the 16th of May, you had conversations with Dukes in which you attempted to induce him to change his plea from not guilty to guilty, is that right? A. That's correct. That was still my best opinion at that time.

Q. And did there come a time when he finally agreed to do so? A. I was not present when he finally agreed to do so. I only can tell you that Mr. Delaney told me. He's here. I suppose you should ask him.

Q. And then there came a subsequent time when you appeared on behalf of Mr. Dukes for purposes of sentencing, in that right? A. Right.

Q. And the record indicates that you advised the Court that Mr. Dukes had told you that he now had another attorney from New Haven, is that right? A. He told me that — no, he told me in the morning — the sequence was a little different. I think it went something like he told me that he did not — he wanted to change his plea, because he felt that when he entered a plea, he was under some medication or some problem that he had, and he didn't realize what he was doing, and that he was going to get another lawyer. Well, I said I cannot make a representation to the Court at this late date to change your plea, and I said I'll inform the Court of it, but if you do have another lawyer, you better bring him up here, because at the last moment, to find this out, I said, you know, you'll have to advise the Court of this fact, which I tried to do on the record, as I recall.

Q. Now, ancillary to this, were you also representing two girls, by the name of Baker and Sejerman? A. I don't have a definite recollection as to the date, but I understand by looking at the record, I was representing them at the time, but if you're asking, I don't have a recollection — I know I represented both of them, and whatever the record appears on these girls, I did represent them both, and was present at their sentencing. The answer to that would be yes.

Q. And was the representation of the two girls, did they come into your office at about the same time Dukes

did? A. They came to my office after Dukes came in. It was really not about the same — they were in there some time around the same time, because they were sentenced about the same time.

Q. Now, were the girls involved in offenses which involved Dukes also? A. Yes, they were

Q. And would you tell his Honor what the plea of the two girls was? A. They plead guilty.

Q. Now, did the question of your representation of the girls arise between you and Dukes? A. No. He knew that I was representing them. There was no problem about that.

MR. WADE: At this time, your Honor, I'd like to offer as Petitioner's Exhibits One, Two and Three, the transcripts of the proceedings before Judge Devlin, on April 18th, involving *State* v. *Andrea Sejerman,* docket number 28080, and *State* v. *Sandra Baker,* docket number 28081.

MR. LABELLE: I have no objection.

THE COURT: What would be the purpose of offering the transcripts of what happened at their sentencing?

MR. WADE: I think, your Honor, this: Mr. Zaccagnino has testified that he advised the Court of a conflict between his client and himself; that he, on behalf of his client, in good faith, attempted to withdraw from the case, and that the trial Judge at that point in time said I'll not let Mr. Zaccagnino out of the case, but I'll give this man twenty-four hours to come up with another attorney.

THE COURT: Well, this is what Attorney Zaccagnino testified. He hasn't testified that he had a conflict of interest between the Sejerman and the other. He testified that there

wasn't any — he testified that he explained it to him and there wasn't any objection.

MR. WADE: Yes, but I'm raising it, your Honor, and I have raised it in my amended petition, that there was a basic conflict, and that from a legal point of view, this affects the voluntariness of Mr. Dukes/plea, and so what I propose to offer is the proceedings before the Superior Court when the girls plead guilty, and then the proceedings before the Superior Court when they were sentenced.

THE COURT: There is a third exhibit you wish to have made an exhibit?

MR. WADE: Yes, your Honor.

THE COURT: Which would be the sentencing by Judge Devlin of this defendant, am I correct?

MR. WADE: No, that's in the record already, your Honor, on the return of the State's Attorney.

MR. LABELLE: Apparently what he wants to offer is the sentencing of the two girls. I have no objection.

THE COURT: Well, I do.

MR. LABELLE: I understand that, your Honor, and I fail to see the connection here at the moment, but if he wants to lay his foundation, it's all right with me.

THE COURT: All right. They may be entered as Petitioner's Exhibits one and two.

MR. WADE: One, two and three, your Honor. The girls are two separate —

THE COURT: You still haven't explained to me what the third one is.

MR. WADE: The first two, Andrea Sejerman, and then Sandra Baker. Then the third one is the sentencing, which is joined in both cases.

MR. LABELLE: May we have the dates?

MR. WADE: Dates of number one and two would be April 18, 1967, and three would be June 2, 1967.

THE COURT: All right. They may be marked. (The documents referred to were received in evidence and marked Petitioner's Exhibits One, Two, and Three, respectively.)

MR. LABELLE: Is number one Sejerman?

THE COURT: That's right.

THE CLERK: Number two is Baker.

THE COURT: And the sentencing is number three. Is there some particular portion of this you wanted me to refer to?

MR. WADE: Yes, your Honor.

THE COURT: Or may I read then at my convenience?

MR. WADE: Yes, your Honor, but I would refer specifically on the transcript of sentencing remarks to page six, through the top paragraph on page seven, and page nine, the first full paragraph.

THE COURT: All right. They have been noted by the Court.

BY MR. WADE:

Q. Mr. Zaccagnino, at the time of sentencing, the transcript indicates, and I don't want to take this out of con-

text, and I want to give you the opportunity to put it in the proper context, the transcript indicates that you said to the Court, after Mr. Dukes had indicated he wanted to withdraw his guilty plea, "This is the first I heard of it, your Honor, but I had a suspicion that this may take place, because of the problem when he entered the plea, I was maybe a little forceful." Could you tell his Honor the background in connection with that?

THE COURT: This appears on what page of the transcript?

MR. LABELLE: It's on the June 16th sentencing remarks, under the return, your Honor.

MR. WADE: And that would be the bottom of page four and the top of page five, of the June 16th sentencing remarks.

THE COURT: That has to do with a motion to suppress. Is that the one you're talking about?

MR. WADE: June 16th, your Honor.

THE COURT: I just took the first page four I came to.

MR. WADE: Toward the very back of the return, your Honor.

THE COURT: I have it now.

THE WITNESS: May I have the question read to me, your Honor? I just forgot it.

THE COURT: You may. (The pending question was read back by the Court Reporter.)

THE WITNESS: Well, to go back, if your Honor please, to the background, there were five or six warrants pending

against Dukes, and Dukes maintained that in this particular case he was innocent, and he said he wanted a trial on the matter. I reviewed the files, and after looking at them, it was my independent judgment that I couldn't win this case or any of these cases after I had reviewed the evidence, and I told Dukes this, and I told Dukes it was in his best interest to wipe them all off, and get concurrent sentences, which were going to be recommended by the State's Attorney, and as a practical matter, I probably was a little forceful because my judgment was swaying me, that I was correct, that he was not correct, in his opinion that he should plead not guilty. He claimed consistently to me that he didn't make any sale of narcotics, and so I told him what I thought about the case, after reviewing the evidence. So from the beginning, Dukes wanted a trial, and I probably thought I might have been too forceful, but it sometimes happens that your judgment, you're trying to impose upon a client, knowing that it's in his best interest, at least in your opinion it is, and I told Charlie it would be winning the battle and clearing the way, because there was no way, with these five felony warrants pending against him, that I was able to win them all, because I said no matter what you think about this case, it's my opinion that it's your best interest to plead guilty, and at no time did I have a conversation whether he was guilty or not. Mr. Delaney handled that at the time of the change of plea, but I know when I talked to him, he maintained he was innocent. At some later date he changed his plea, so I assume there was some conversation about that, and I don't know what took place in the meantime, but basically, there was the reason that I made that statement to the Court, because he was insistent that he wanted to try the case, and I kept trying to get the matter put down, because I didn't think it was in his best interest to try it.

BY MR. WADE:

Q. In other words, looking at it from a defense point of view, you felt it was in his best interest to plead guilty and get everything wrapped up all at one point?

A. That's correct.

MR. WADE: I think that's all.

CROSS EXAMINATION BY MR. LABELLE:

Q. Mr. Zaccagnino, with respect to the girls, Sejerman and Baker, you didn't represent Dukes in that case, did you?

A. No, I didn't represent Dukes in that case, but Mr. Barlow did.

Q. And so far as Sejerman and Baker are concerned, Dukes was a defendant with them in that same set of circumstances? A. That's correct.

Q. And he had counsel, other than you, for that case, did he not? A. I believe it was Boce Barlow, if my memory serves me right.

Q. And you did not represent him in that case?

A. No, I did not.

Q. You represented the two girls? A. Represented the two girls.

Q. And when you referred, in the sentencing remarks, to Mr. Dukes, you were referring, I take it, to that particular case, you said that he had taken a plea. Do you recall that?

A. Well, I don't remember what I was referring to, Mr. LaBelle, there were so many cases that were at that time pending, and I don't remember what I was referring to, but I know he had taken a plea —

Q. I show you Exhibit Three, and ask you if you can refresh your recollection with respect to the remarks you made on page six and the top of page seven.

A. I don't remember him ever taking a plea in that case.

Q. But you were referring to his pleading in that case that involved the girls, were you not? A. It appears as if that's the way I said it. I really don't know. As a matter of fact, the first time I knew that he took a plea to that case, my memory is now, looking at this file — I don't have a memory of him taking a plea. I assume that's what I was referring to, but I don't have a definite recollection.

Q. Well, isn't it a fact that the girls were only involved in this one case? A. They were only involved in this one case, right.

Q. With respect to the case for which he's sentenced to the prison now? A. They were not involved.

Q. Which involved the narcotics charge, and the larceny charge, for which he's now sentenced, the girls had nothing to do with that case? A. No, they were not involved in that case.

Q. Not whatsoever? A. No.

Q. So that your remarks on Exhibit Three, with respect to the girls talking about Dukes, only had to do with the particular charge that the girls were involved in?

A. I would assume so, from looking at the record. I don't have a definite recollection. That would be my assumption, based on what I said there.

Q. In other words, if the girls were talking to the police about Dukes, they were talking about the case they were in, isn't that so? A. I think that there was — yes, I think so. They also questioned them on something else to

do with Dukes, and I don't remember — it had nothing to do with this other case, though, I'm certain of that.

Q. Nothing to do with the case he was sentenced on?

A. There was something pending with Dukes that they wanted him to testify on, but I don't remember what that was about, but nothing to do with the narcotics case.

Q. Now, let's go back to the case for which he has brought this habeas corpus. Mr. Delaney represented him on May 16th when he entered his plea? A. That's correct.

Q. You were not there? A. I was not.

Q. And then the matter was set down for presentence report for June 2nd. Do you recall that? A. The actual date, no, but if it's in the record, I assume that's the correct date.

Q. Do you recall whether or not you took up with me the possibility of consolidating certain charges that were pending against him in other counties? A. Oh, yes, I took that up with you. That was prior to the time of plea I discussed all of that with you.

Q. So that the case, if it was set down for sentencing on June 2nd, do you recall appearing in Court on June 2nd with respect to postponement of the day of sentencing?

A. Let me see that record, and if I can refresh my recollection — probably — the dates, I don't have definite recollections of the dates.

MR. LABELLE: I'll borrow yours, if I may.

MR. WADE: Go ahead.

MR. LABELLE: This is on the return, your Honor, the transcript of June 2nd.

THE WITNESS: Yes, your Honor, I have read this,

and it does refresh my recollection, and I was in Court on June 2, 1967, and we had it continued to June 16th.

Q. Now, at that time, Mr. Dukes was present with you, was he not? A. I can't give you an answer to that, Mr. LaBelle. I don't have a recollection. I would assume that he was, because all the times that these matters come up, they made me appear with client in hand, but I don't have a definite recollection.

Q. Let me just ask you this; isn't it so that with respect to Dukes, that I insisted that he appear in Court for every continuance? A. Yes, that is correct, and I don't have any definite recollection of him being there that day, but I would assume he was there.

Q. Now, from May 9th, when you first appeared in Court, when you were with him, was he on bond in this case?
A. Yes, I believe he was.

Q. For which he's sentenced? A. Yes, he was on bond.

Q. And he was on bond May 16th when he appeared with Mr. Delaney? A. Oh, yes.

Q. And he was still on bond pending the presentence report, which was originally scheduled for June 2nd?
A. That's correct.

Q. And when you got the continuance on June 2nd, he was still on bond? A. That's correct.

Q. Now, as of June 2nd, weren't you still intending to have the cases consolidated from the other counties for purposes of disposition? A. Yes, I was. I see in the record that I made some statement about having the matters consolidated.

Q. And one of the reason it had to be continued was because they hadn't got there, isn't that so?

A. That's correct.

Q. Now, at that point, on June 2nd, had Mr. Dukes at any time ever said anything to you about getting another lawyer? A. Not to my knowledge, but I would say this, that during that period, I really don't have any definite recollection of whether he spoke to me about it — I would assume not, because I had asked for the matter to be continued for consolidation. I would have to assume that he did not.

Q. And on June 2nd, did he ever say anything to you about wanting to change his plea of guilty? A. I don't think he did on that date, but —

Q. Well, it's obvious he didn't when you wanted to consolidate the cases, isn't it? A. I don't think he did, no. I can't remember when he actually spoke to me the first time about it.

Q. But isn't it so that you knew in order to consolidate cases that there had to be a guilty plea in all cases?

A. Well, I'm fully aware of that and I was aware of it at the time.

Q. Now, let's go to June 16th, the day of sentencing. Up to that point, had he ever told you that he wanted another lawyer? A. Something in my memory says that maybe the day before, that we had a conversation somewhere in the Court, and I got the feeling that he wasn't happy with the plea of guilty that had been entered, but it might have been the same day —

Q. I'd ask you to refresh your recollection by examining the June 16th transcript. A. Yes, I think that's probably the first time that — as I say, if it was, it was within twenty-four hours of this time. It was a short period of

time prior to this time that I was advised. I don't see in here when I said I was advised. Mr. Dukes advised me there's other counsel. I would say it was either that day or the day before he met me in Court, that I got the message from Mr. Dukes that he was bringing in other counsel.

Q. That's the first time you knew about any other counsel? A. Except that originally when he wanted to bring in other counsel, and when I tried to get out of the case originally, he told me he wanted to get other counsel from outside the county, because he didn't figure that any lawyer within the county could do him as good as a lawyer outside of the county.

Q. That was back on May 9th? A. I said feel free to bring in whoever you want. I said if you want me out, I'll get out. At that time he told me he was going to bring another lawyer in, but I didn't hear about it again until the 16th.

Q. Now, I'm refreshing my recollection on the transcript of June 16th. Will you look at that, on page four? A. Well, from my remarks there, I would say that I had found out about it that day.

Q. Now, that's with respect to change of plea, on page four. A. Yes. What's your question, Mr. LaBelle?

Q. When was the first time he ever told you that he wanted to withdraw his plea of guilty? A. Well, the morning that we went into Court he told me that, and I advised the Court of that, the morning of this statement.

Q. June 16th? A. Yes, whatever day it is, June 16th.

Q. So that from May 16th, when he put in his plea of guilty, until June 16th, when he told you in Court, at the time of the sentencing, did he ever tell you he wanted to

withdraw his guilty plea? A. Not to my knowledge. I would say no, by looking at that transcript. I don't have a definite recollection, but the transcript suggests to me that when I made a statement in Court that he told me that morning, that that was the best recollection that I had then, would be the situation that occured.

Q. As a matter of fact, you were totally taken by surprise on that, weren't you? A. Well, I see from the record that I was, yes. As I say, I don't have a definite recollection, but looking at my words here, I would say that I was taken by surprise. The answer would be yes.

Q. And isn't it a fact that during the month from May 16th to June 16th, he was on bond at all times? A. He was.

Q. And you communicated with him during that period?
A. Yes, I saw him on occasions.

Q. And you also saw him in Court on June 2nd?
A. Right.

Q. And yet on June 16th, that was the first time that you had any inkling that he wanted to withdraw his plea of guilty? A. The word, "Inkling," I would say no, but it's the first time he told me directly that he wanted to withdraw his plea. I had the suspicion that he was going to change his plea, but he never told me directly he was, until that morning.

MR. LABELLE: I believe that's all I have, your Honor.

REDIRECT EXAMINATION BY MR. WADE:

Q. One thing I want to get straight. The Baker and Sejerman girls, they were clients in your office from some time prior to April 18th, when the plead guilty, until June 2nd, when they were sentenced, right? A. You didn't put

anything on the subpoena — I don't know the date — the only way I can tell the day that they come in my office is by looking at a file. I know they had to be in my office — they had to be clients for more than six weeks, because a presentence takes at least four, and they spoke to me before that, so I would say at least six weeks they were clients of mine, where I had appearances filed for them.

Q. And during a portion of that period at least, at least from May 9th, Dukes was also a client of yours, is that right?

A. That's correct.

Q. And you had engaged in conversations with the girls about the handling of their cases, right? A. Oh, there's no question about that, yes.

Q. And you had engaged in conversations with Dukes about the handling of his case? A. Right.

Q. And you were aware of the involvement of the girls with Dukes on the matter they were being charged with?

A. Oh, yes, I was aware of that.

Q. Now, Mr. LaBelle has called your attention to the June 2nd appearance date, when you appeared on behalf of Dukes. A. Yes.

Q. The record seems to indicate to me, at least, that there was a probation report that was not prepared, is that true? A. Oh, that's right. The reason for the continuance, original reason for the continuance was really twofold; one that the probation — they told me the probation report wasn't ready. Terry Capshaw had called my office a day or two before, and said, "Pete, we are not ready," and he said, "We are going to have to ask for a continuance," and I said fine, and I added also that the other cases were coming in.

Q. Now, in other words, the delay on June 2nd was

partially the State's responsibility and partially that the defense wanted additional time on the negotiation of other cases?

A. Well, I would say primarily it was the State's, because if they were going to proceed, they would have proceeded that day, I'm sure, irrespective of other matters.

Q. And on the question about Mr. Dukes being out on bond from May 16th to June 16th, do you have any independent knowledge of your own as to whether or not he was in fact out on bond all that time? A. No, but I do know this, that there was a period of time I didn't see him, but I do know that prior to the time of June 2nd he was out on bond. Now, if he got arrested in the inbetween period, I don't know anything about it. I know he was arrested in the Courtroom for something, and may not have been out on bond for a period of time.

MR. LABELLE: That's all I have.

THE COURT: Thank you, Mr. Zaccagnino.

MR. WADE: Mr. Delaney, will you please take the stand?

ROBERT C. DELANEY, called as a witness, having been duly sworn, was examined and testified as follows:

CLERK OF THE COURT: Would you please state your full name and address?

THE WITNESS: Robert C. Delaney, 4 Regency Drive, Bloomfield.

DIRECT EXAMINATION BY MR. WADE:

Q. Now, your occupation, Mr. Delaney? A. I'm an attorney.

Q. And how long have you been an attorney? A. Eight years.

Q. And where do you practice? A. In Hartford.

Q. And are you a member of a law firm? A. Yes.

Q. Whose firm? A. Zaccagnino, Linardos and Delaney.

Q. And you are a partner in that law firm? A. Yes.

Q. And you are a partner of Mr. Zaccagnino's? A. Yes.

Q. Do you know the petitioner, Charles Dukes? A. Yes, I do.

Q. The record indicates that on May 16, 1967, you appeared with Mr. Dukes in the Superior Court in Hartford before Judge Johnson, at which time he entered a plea of quilty to the charges pending against him. Do you recall that date?
A. I recall the day, yes.

Q. And do you recall being there with Mr. Dukes?
A. Yes.

Q. Preparatory to that Court appearance, when was the first time you talked to Mr. Dukes? A. I believe I had talked to him several times about this case. I had been in Court when the matter was in Circuit Court. I had talked with Mr. Dukes about it, and I talked with Mr. Zaccagnino about it.

Q. In other words, this was being handled as an office matter? A. That's correct.

Q. And did the question of whether or not he should plead not guilty come up? A. Well, I don't know if I had discussed it with Mr. Dukes prior to that date, but I had discussed it in the office.

Q. With Mr. Zaccagnino? A. Yes.

Q. To the best of your recollection, can you tell us what transpired the morning of May 16th, prior to the entry of the guilty plea with regard to your conversations between Dukes and yourself? A. Well, this is only based on my recollection.

Q. I understand. A. I recall that we were called over there, that Mr. Zaccagnino was not available — I don't remember the exact reason — that there was pressure on myself as attorney and on Mr. Dukes, to either go forward or enter a plea, because the State was prepared to go forward, that I remember Mr. Dukes and I had rather lengthy conversations —

Q. Where was that conversation? A. I believe they were out in the hallway, at various places in the hallways, that I can recall taking him aside and talking to him about the problems. I think the basic position that I took with him was that he had many cases pending, some in other jurisdictions, some in the jurisdiction of the Superior Court in Hartford, that it was my feeling that if he did not enter this plea and dispose of all these matters, that if he tried this case, then they would just go on, and I think I had indications that they would just trying one case right after another, and eventually he was going to be convicted, and perhaps expose himself to further punishment than was going to be the recommended prison term.

Q. So your advice was a tactical one as counsel?
A. That's correct.

Q. What time period was involved that morning, in these discussions? A. I believe it took most all of the morning, and it might even have gone into the afternoon. I'm not sure of the time, but I know that we had lengthy conversations, and I know I had conversations —

THE COURT: This is your discussions with the defendant?

THE WITNESS: With the defendant, and with the State's attorney, and on that particular day.

Q. At the outset of these discussions, did Dukes maintain that he wanted to plead not guilty? A. Oh, yes. Well, he had already pled not guilty I believe at that time.

Q. I mean that he wanted to proceed on the merits of the case? A. Yes.

Q. And it wasn't until after these discussions with you that ultimately the guilty plea was entered? A. That's correct.

Q. Would you tell us how Mr. Dukes appeared to you that day, and I might lay a foundation for that by saying we have an hour petition for habeaus corpus a claim has been made that at the time of the entry of his plea, Mr. Dukes was under the influence of physical and mental disturbances. Now, all I'm asking —

THE COURT: What is the reason for the explanation, Mr. Wade? Why can't we have uncluttered testimony without any explanation of what you're driving at?

MR. WADE: All right, your Honor. I'm sorry.

THE COURT: I don't think it's necessary to put in his mind what you are driving at. Let me determine what his testimony shows.

BY MR. WADE:

Q. Could you tell us how he physically appeared to you that day? A. Well, other than being agitated, he did not —

let me say this. I had seen him before, in our office, and in Court, in the Circuit Court and other Courts, and he did not appear to be in the same condition of mental alertness or physical well-being, on this particular day in Court, as he had on previous occasions.

Q. All right. Could you elaborate on that for his Honor?

A. Well, having not only represented him in cases, but seen him in other Courts on other occasions, I had had many conversation with him when he appeared to be—well, I would say he was a very good humored person, happy-go-lucky, and we would make jokes or kid around, and this particular day he did not seem as alert, and also, of course, as I say, we were under pressure and he was under pressure at the time, and I don't know what the cause of it was, whether it was a fact that we were discussing a very serious matter, or that it was anything physical, I would be unable to say.

Q. In this matter about being under pressure to go forward, when had your office learned, prior to the 16th, to be available and in Court ready for trial? A. I can't answer that question. I don't remember.

THE COURT: I think we can take judicial notice of the fact, Mr. Wade, that a date is set when a plea of not guilty is entered, which would have been the original date he was presented in Court. They were on notice, they had a not guilty plea, they probably elected a jury trial. The record would show that, so that they had all that time to get prepared.

MR. WADE: Yes, your Honor.

THE COURT: Whatever it was, whatever the period was.

MR. WADE: Yes, your Honor. I think that's all the questions I have.

CROSS EXAMINATION BY MR. LABELLE:

Q. Mr. Delaney, was there any question in your mind that Dukes knew what he was doing when he entered his plea on May 16th? A. No, not that he knew what he was doing.

Q. And is there any question in your mind but what his plea was voluntarily entered at that time by him?

MR. WADE: Well, just a minute. I'll object to that last question, your Honor, on the grounds that that calls for a legal decision, and it goes to the crux of our claim here. The question of voluntariness is a matter of law, I believe, that the Court must examine both the factual basis and the law as submitted by petitioner, and the Court must decide whether or not the plea was voluntary, and therefore it goes beyond the competency of Mr. Delaney to testify as to whether or not he believes it was voluntary.

THE COURT: I believe they can offer his testimony and his opinion as to whether it was voluntary or not. He participated in the entire action, and he would be subject to testifying whether he gave it on the basis of a promise, or whether he gave it by reason of duress. He previously stated it was given under pressure, so that I think this is proper cross examination. The objection is overruled for the record. You may answer the question, Mr. Delaney.

MR. WADE: Exception may be noted.

THE COURT: Exception noted.

THE WITNESS May I have the question read back, please?

(The pending question was read back by the Court Reporter.)

THE WITNESS: No.

BY MR. LABELLE:

Q. And isn't it a fact that the matter for trial was one count of the information of a narcotics charge? A. Yes.

Q. And wasn't there some discussion between you and me about the fact that for purposes of going to the jury, we were going to try the narcotics case? A. That's right.

Q. And that it was our understanding that we had this other case of the larceny count, that had been taken out of the original information, so that it would not prejudice the case before the jury? A. I don't recall that exact conversation.

Q. But you do recall the fact that we had to file an amendment by adding back a second count? A. Yes.

Q. And he was to plead to the narcotics count and the larceny count, is that correct? A. Yes.

Q. Now, with respect to his physical condition, was there anything that you knew about his physical condition that in any way impaired his ability to act on his plea and to change his plea as he did? A. Well, there was nothing that I knew, because if there was, I would have reported that to the Court, and I think we could have had a continuance without any problem.

Q. Yes, you would have reported it, would you not?
A. Yes.

Q. Now, isn't it also a fact that the Court made specific inquiry of Mr. Dukes, at the time of this change of plea, as to whether or not he was satisfied with you as his attorney in place of Mr. Zaccagnino? A. Yes.

Q. And he also asked him certain questions which the record shows, with respect to his plea, isn't that so?

A. That's correct.

Q. And you were present of course in all that time?

A. Yes.

Q. Now, did you have anything to do with Dukes, in this particular case, after May 16th? A. I may have had conversations with him, but I don't recall.

Q. But if you did have any conversations with him at any time did he ever tell you that he wasn't satisfied with your services? A. No.

Q. Did he at any time ever tell you that he wanted to get another lawyer? A. No.

Q. Did you ever have any knowledge that he wanted to change that guilty plea back to a not guilty plea? A. My recollection was that when Mr. Zaccagnino came back from Court that day, and informed me that we were both — this was the first time I had heard of his indication of changing his guilty plea.

Q. That's on the day he was sentenced? A. Yes.

Q. So that from May 16th to June 16th, when he was sentenced, you certainly had no knowledge that he wanted another lawyer? A. No.

Q. Or you had no knowledge that he ever wanted to withdraw that guilty plea which he entered with you?

A. Not to the best of my recollection.

MR. LABELLE: I believe that covers it, your Honor.

THE COURT: Any redirect?

MR. WADE: No, your Honor. That's all.

THE COURT: You may step down.

MR. WADE: Call the petitioner. I might point out for the benefit of Mr. Delaney and Mr. Zaccagnino that if they want to leave, I don't propose to use them any more.

THE COURT: Would there be any reason to keep them, Mr. LaBelle?

MR. LABELLE: I have no reason.

THE COURT: All right. Mr. Delaney and Mr. Zaccagnino are excused.

CHARLES DUKES, called as a witness, having been duly sworn, was examined and testified as follows:

CLERK OF THE COURT: Would you please state your full name and address?

THE WITNESS: Charles Dukes, Box 100, Somers, Connecticut.

THE COURT: You have explained to him counsel, his right not to testify?

MR. WADE: Yes, your Honor. We have talked about that. If your Honor would care to explore on the record, and explain to him again his rights in this connection, I think it might be appropriate.

THE COURT: Mr. Dukes, you understand of course that you have a Constitutional right to remain silent, I mean not to testify?

THE WITNESS: Yes, sir.

THE COURT: And you are the only one that can exercise that right. On the other hand, you may if you choose, testify.

THE WITNESS: Yes, sir.

THE COURT: Do you so choose to testify and to waive your right to remain silent?

THE WITNESS: I wish to testify, sir.

THE COURT: And you waive your right to remain silent? I'll ask the question again.

THE WITNESS: Yes, sir.

THE COURT: All right. You may proceed.

DIRECT EXAMINATION BY MR. WADE:

Q. Mr. Dukes, you are the petitioner in this matter, are you not? A. Yes, sir.

Q. Did there come a time in the Spring of 1967 when you retained Attorney Peter Zaccagnino as your counsel to represent you in connection with certain criminal charges pending against you? A. Yes, sir.

Q. Can you tell his Honor to the best of your recollection when you went to see Mr. Zaccagnino? A. Well, at first, Attorney Boce Barlow had the case, and during the course of this time, he's State Senator, and he had business in the legislature, which was in session at this time —

THE COURT: What month was this?

THE WITNESS: I don't recall.

THE COURT: As well as you can recall, as close as you can recall, would it have been April or May, or June?

THE WITNESS: I imagine it was in the vicinity of April.

THE COURT: Well, what I'm talking about now is what date is the arrest?

MR. WADE: I don't know, your Honor, the date of the arrest. Maybe Mr. LaBelle does. Maybe we can get at it this way.

Q. Referring to May 9th, the day you first went into Court, Superior Court, for a plea, how many weeks previous to that would you estimate that you spoke to Mr. Zaccagnino?

A. I spoke to him on several occasions. I think the arrest was on March 14, 1967.

MR. LABELLE: That's correct, your Honor.

A. And during the course of this time, Mr. Barlow says he was tied up, and he wouldn't be able to carry on, and advised me that he would turn all the cases over to Mr. Zaccagnino.

Q. All right. Let's explore that for a moment. Now, you say all the cases. You mean Mr. Barlow was representing you on several charges? A. Yes, sir.

Q. Charges in addition to the one that you are presently here at the prison for? A. Yes, sir.

Q. Now, referring now to this present charge that you are presently here on, what indication did you give to Mr. Zaccagnino as to how you wanted to plead to that charge when you first spoke to him? A. I told him I wanted to plead not guilty, because I wasn't guilty of the charge.

Q. And you told him that on how many occasions?

A. On a variety of occasions. I must have told him maybe twenty-five times or more.

Q. Now, bringing you up to May 9, 1967, the record indicates that Mr. Zaccagnino told the Court that he wanted to withdraw from the case, because you were not satisfied with him representing you. When was the first time you told Mr. Zaccagnino that you wanted another attorney besides him to handle the matter? A. This was on May 9th, before Judge Johnson?

Q. Yes. A. Well, I told him prior to this, and I told him specifically that day, also. I told Judge Johnson —

Q. But what I'm trying to get at, Mr. Dukes, is when did you tell Mr. Zaccagnino prior to May 9th, that you wanted another attorney in the case? A. I don't remember the specific dates, but I told him several times, many times I told him.

Q. Now, prior to May 9th, did you in fact retain or speak to — let's ask it that way — did you speak to another attorney? A. Yes, sir.

Q. Who did you speak to? A. Attorney Bromson, from Windsor, Connecticut. I think his name is Attorney William Bromson.

Q. Anybody else? A. And Attorney — I don't remember all of the names — but I spoke to a variety of them.

Q. Okay. Did you in fact retain any of these attorneys that you spoke to?

THE COURT: Explain to him what you mean by retain.

Q. All right. Did you pay any of these attorneys a fee, in advance of going to Court, for them to handle the matter for you? A. The morning that I was in Court, for this attorney, the attorney called Mr. LaBelle, the State's attorney's office, and advised him that he was retained to represent me, Attorney Fazzano.

THE COURT: That's on June 16th?

Q. I'm trying to get to that, your Honor. Prior to May 9th had you paid a fee to Mr. Zaccagnino? A. Yes, sir.

Q. And prior to May 9th, had you paid a fee to anybody else? A. No, sir — excuse me, Mr. Barlow.

Q. All right. Mr. Barlow. A. Yes.

Q. But Mr. Barlow had told you because of his legislative matters, he could not represent you, right? A. Yes, sir.

Q. Well, am I correct in believing that prior to May 9th you had not in fact retained any other attorney other than Mr. Zaccagnino? A. Other than Mr. Zaccagnino, that's all.

Q. Now, you have mentioned the name just now, Mr. Fazzano. When was the first time you spoke to Mr. Fazzano?

A. Well, I finally got an attorney that would accept the case, I think it was approximately twenty-four hours before I was going before June 16th.

Q. Approximately twenty-four hours before June 16th?

A. Yes, sir.

Q. You say you got an attorney that would take the case?

A. Yes, sir.

Q. And who was that? A. Mr. Fazzano, Attorney Fazzano.

Q. And when was the first time you talked to Mr. Fazzano? A. I talked to him over the telephone, because he was -- I was recommended to him.

Q. What I'm trying to get from you, Mr. Dukes, is when it was that you first talked to him. A. About a day or two before June 16th. I would say the 14th or the 15th.

Q. Of June? A. Yes, sir.

Q. Now, going back to May 9th, and I'm referring, your Honor, to page 2 of the return, there's a statement by Mr. Zaccagnino in the record, that you had told him you wanted to represent yourself, is that correct? A. Yes, I told him and Judge Johnson also, sir.

Q. All right. My question is to you, when did you first tell Mr. Zaccagnino that you wanted to represent yourself? A. I think that would be approximately on May 9th, somewhere in that vicinity.

Q. On that day? A. Somewhere in there, yes, sir.

Q. And also on page two, Mr. Zaccagnino indicated that you had told him that you wanted to get additional counsel. Now, when did you first tell Mr. Zaccagnino that you wanted to get additional counsel? A. The day that Judge Johnson allowed us the twenty-four hour continuance. I don't know that specific date. I think this was the early part of May.

Q. Yes, but what I'm trying to get at, Mr. Dukes, is when did you tell Mr. Zaccagnino that you wanted another lawyer? A. That day, the specific day, yes, sir.

Q. Now, do you recall being in Court on May 9, 1967? A. Yes, sir.

Q. Mr. Zaccagnino was with you? A. Yes, sir.

Q. I want you to describe to his Honor what happened — strike that. What time did you leave the Courtroom, if you can remember? A. Approximately I would say eleven thirty. Q. In the morning? A. Yes.

Q. And this was the Superior Courthouse on Washington Street? A. Yes, sir.

Q. And what happened when you went out of the Courtroom? A. Well, I was in Court, some State Policeman was sitting in the back. One was investigating the case, and I was in contact with them quite frequently during the course of this trial. Judge Sidney Johnson told me, when I informed the Court that I wanted an opportunity to hire new attorney to represent me in this case, he gave me twenty-four hours to retain a new counsel.

Q. And what happened when you left the Courtroom?

A. Well, as I walked out the door, there was a policeman, Madison Bolon, he's a detective on the narcotic -- I think he handles narcotics — and he says Charlie, a warrant is coming down for you. He says you can walk out or you could go, but if you leave, we'll have to pick you up, so I says well, I only have twenty-four hours to hire a new counsel to represent me in this matter, and he says okay, so I attempt to walk out the door, and another detective, a Detective D'Onofrio —

Q. Who? A. Detective D'Onofrio —

Q. Of the Hartford Police? A. Yes, sir. He came up and grabbed me on my shoulder, and he says, "You're not going no where, you're under arrest," so I says, "If I'm under arrest, may I see the arrest warrant, because I only have twenty-four hours to get a counsel, because this matter will go forward in twenty-four hours," so he says, "Well, the warrant will be down," so I was reluctant to submit to arrest, because of the

time that was involved, and the absence of the arrest warrant, so I attempted to walk away, and about nine or ten policemen grabbed me and shoved me around the hall, knocked me down on the marble floor in the hallway, right in the presence of Mr. Barlow, Mr. Zaccagnino, and maybe a hundred spectators, right out there.

Q. And then what happened? A. And then they took me in the back room, at the Courtroom, and I think they called a wagon, they called a paddy wagon, what they take people to jail in, and they took me down to the Hartford Police Department.

Q. This was still on May 9th? A. Yes, sir.

Q. And what happened then? A. Well, I had just came out of the hospital for being in the hospital for over three months, from a major heart surgery, and major surgery, and I was in pretty bad shape because I just had been out maybe a couple of weeks or so, and I was depressed and confused and upset, and I had had medication, and I went in the men's room and I took all the medication I had. I guess it was about twenty-five or thirty pills.

Q. This is the men's room of the Police Department?
A. Yes, sir.

Q. And what happened? A. That's all I remember. When I woke up I was in the hospital with intravenous, and strapped down in the bed, and soforth and so on, with a police guard.

MR. WADE: At this point, I'd offer a copy of the medical report of the McCook Memorial Hospital, regarding Mr. Dukes' hospitalization there.

MR. LABELLE: No objection.

THE COURT: Petitioner's Exhibit 4.

(The document referred to was received in evidence and marked Petitioner's Exhibit 4.)

(There was a discussion off the record.)

BY MR. WADE:

Q. How long were you in the hospital? A. I don't remember, because I was unconscious, and I don't hardly remember when I left out of there, because I was in — had to be helped out.

MR. WADE: May I show him the document to refresh his recollection, your Honor?

THE COURT: Yes, point it out to him. It said he was conscious when they brought him in.

Q. I show you Petitioner's Exhibit 4 and ask you to look that over, and does that refresh your recollection as to how long you stayed in the hospital? Have you read it over?
A. Yes, sir.

Q. Now, referring to that, does it help you to remember how long you were in, by looking at that document, does that help you remember? A. Yes, sir. I add it up to be four days.

. All right. Now, I want to understand one thing. You say that you took these pills in the Hartford Police Station the day you were arrested? A. Yes, sir.

Q. Now, the hospital report, that was May 9th —
A. Yes, sir, the same day.

Q. Now, this hospital report indicates you were admitted on 5/11/67, in an unconscious state. The question is, were the

pills taken at the police station or somewhere else? A. At the police station.

Q. And when did you wake up? A. I don't remember. I don't remember when I woke up because I was in such a daze, I didn't even know where I was.

Q. All right. Now, when you woke up, were you in a bed? A. Yes, sir.

Q. And were there any kinds of restraints on you? A. Yes, sir.

Q. What restraints? A. My legs —

THE COURT: What does this have to do with what happened when he got to the hospital, as to what his condition was? He didn't enter a plea that day.

MR. WADE: No, your Honor. What I'm getting at is that one of my claims here in the petition is that the plea was involuntary because he was not afforded reasonable opportunity to get counsel. I intend to show here, through the sequence of questioning, that from the time Judge Johnson said he had twenty-four hours to get another lawyer, he was placed under arrest — now, I'm going into whether or not he was in restraint when he was in the hospital, and I'll take it from there.

THE COURT: All right.

BY MR. WADE:

Q. Were there any restraints on you when you were in the hospital? A. Yes, sir.

Q. What restraints? A. My hands was handcuffed to the bed, and my ankles was tied to the bed, with straps down

to the bed, with a police officer was at the bed with some visitors.

Q. Speak up so the Judge can hear you. A. Yes, sir. My ankles —

THE COURT: I can hear alright.

Q. Now, the report says that on May 13, 1967, you signed out against medical advice. What is the advice that you were given? A. Well, when I woke up, I didn't realize —

MR. LABELLE: What date?

MR. WADE: The report says May 13, 1967.

A. When I woke up, I didn't realize what I was saying or what I was doing, and I asked a nurse, I think it was. something to the effect could I go, because I was all shackled down to the bed, and intravenous was in my arms, and then they had something down here, and around me, and she says you are not in no condition to leave, and she says I have to see the doctor, so she went and got — I do remember she got about five doctors, and they kept telling me I shouldn't go, but I didn't really — if I realized what I was saying, I would have stayed, but I didn't realize what I was saying, so I don't remember signing out, but I remember saying that I wanted to go.

Q. Where did you go? A. Well, the policeman helped me outside, and they took me down to the police station in Hartford.

Q. From the hospital you went where? A. To the police station, and the police cell, down in back of the jail.

Q. Was it the jail or was it the Morgan Street Police Department. A. Well, the Morgan Street Police Department.

Q. And how long were you held there? A. I don't recall how long I was there.

Q. All right. The question is, were you ever at liberty prior to May 16th, when you finally went in and pled guilty to the charge? A. I think there was very shortly, very briefly.

Q. Well, you were at liberty, right? A. Very briefly.

Q. Well, can you tell his Honor how long? A. I can't recall how long I was at liberty at that time, because this was quite an ordeal.

Q. Now, during this period, were you taking any medications? A. Yes, I was taking medication.

Q. Where did you get them? A. I was getting the medication from — it was subscribed (sic) by Dr. Schwartz of Hartford. I think his office is Edwards Street — Burton Street, excuse me, Burton Street.

Q. And prior to your entry of your plea of guilty on May 16th, did you take any medications, and if so, how much? Now, I don't mean while you were at the hospital, I mean while you were at liberty, did you take any? A. Oh, I was taking them right along, because he had described (sic) them, and I was taking them I think three or four times a day I think it was.

Q. Did you advise Mr. Delaney that you were taking them, or Mr. Zaccagnino? A. No, sir, I didn't tell them.

Q. Now, referring now to May 16th, in the Superior Court in Hartford, did you have a discussion with Mr. Delaney regarding your plea of guilty? A. Well, yes, sir. I was very much surprised to see him there that morning.

Q. Now, tell his Honor what transpired between you and Mr. Delaney with regard to how you would plead on the case.

A. Well, it was my full understanding that I was to make a temporarily guilty plea, and I was under the impression from him that it could be withdrawn any time before imposition of the case.

Q. Imposition of what? A. Imposition of the sentence.

Q. Now, go back to that phrase, temporarily guilty plea, where did you get that? A. Well, that's what I understood Mr. Delaney to say.

Q. How long a period of time transpired in your discussions with Mr. Delaney about what plea you should enter?

A. Well, I would say about ten minutes. He says the only chance we got is to plead guilty, because I don't have adequate time to prepare your proper defense, and the State is going forward this morning, so our only shot is to plead guilty to this temporary guilty plea, and I was under the impresssion that it was counsel's strategy for me to delay to get a new counsel, whereas I could be properly defended.

Q. All right. Now, there came a time on May 16th, before you entered your plea, and I'm referring, your Honor, to page two of the May 16th transcript, where the Court asked you certain questions. Do you remember that?

A. Yes, sir.

Q. And the Court said, "Are you satisfied with Mr. Delaney and the services he is rendering you?" Do you remember that? A. Yes, sir.

Q. Do you remember what you said? A. Yes, I remember what I said.

Q. All right. You said that you were satisfied, right?

A. I was satisfied for the simple reason I was under the

impression that this was a formality and temporarily when Mr. Delaney cautioned me that the questions — that Judge Johnson would most likely ask me questions

Q. And the Judge asked you if you were entering your plea of your own free will, and you said yes to that? A. Yes. I was going along with the attorney's advice.

Q. And the court asked you if you knew the probable consequences, and you said yes to that? A. Yes, sir.

Q. Well, the question, Mr. Dukes, which is very basic to this case, is if you told the Judge that you were satisfied with counsel, and that you knew what you were doing, and this was a voluntary plea, at that point, the question is, is that what you meant to do when you plead guilty? A. That wasn't my intention whatsoever. I had no intentions of going forward with a guilty plea.

Q. Now, on June 16, 1967, by that time you had talked to Mr. Fazzano, right? A. Yes, sir.

Q. How many times? A. I must have spoke with him two or three times within two days, over the telephone.

Q. You had sent him a fee? A. I had told him I would have his fee there that morning. I did, when I was in Court that morning.

Q. Now, that's the next question. That morning in Court, did you have any money on you? A. Yes, sir.

Q. How much money did you have on you? A. I had about — let's see — I think it was about fifteen or sixteen hundred dollars.

Q. Was that the fee for Mr. Fazzano? A. He wanted fifteen hundred dollars, yes.

Q. Had you told Mr. Fazzano that you were going to be in Court that day? A. Yes, sir.

Q. What did he say, if anything, about his appearance there? A. He told me to go ahead to the Court, and he would contact the Court and the State's Attorney's office, and advise them that he is representing me with this matter, as counsel, and he said hat he would ask for a continuance for two or three days, or five days at the most, because he was detained in the Superior Court in New Haven on another case.

Q. Now, what did you think was going to happen on June 16th when you went to Court? A. Well, I thought that Mr. Zaccagnino would explain to the Court about the guilty plea, and I thought Mr. Fazzano would be there and take over from there.

Q. Well, you knew it was down for sentencing, didn't you? A. Yes, sir.

Q. Did you expect to be sentenced that day? A. Not at all, sir.

Q. Now, there are some statements that you heard this morning, in the file, by Mr. Zaccagnino, in which he says he influenced you —

THE COURT: Mr. Wade, you are going to be a while longer with him, aren't you?

MR. WADE: Just a couple of more questions, Your Honor.

THE COURT: I don't want to be in the position of shortening you up. Recess until two.

(Whereupon, Court was in recess for lunch.)

AFTER RECESS:

THE COURT: You were still questioning Mr. Dukes, Mr. Wade, when we recessed.

BY MR. WADE (continuing):

Q. Now, there was a statement made by Mr. Zaccagnino, at the time of sentencing in your case, Mr. Dukes, in which he said to the Court that he was maybe a little forceful. I want you to tell his Honor what transpired between you and Mr. Zaccagnino, regarding his telling you whether you should or should not plead guilty to the charges against you.

A. Well, he was trying to persuade me to change my plea all along, since he said he read the records or something in the State's Attorney's office, he was persuading me, you know, to change my plea and so forth and so on, because he wasn't going to try the case.

Q. Well, the question is, did he threaten you in any way, Mr. Zaccagnino? A. Well, what do you mean by threaten?

Q. Well, you explain to us — I don't know — did you feel you had received any sort of a threat? A. Well, I actually don't know exactly the definition for, you know — I mean in what terms you mean, but like I say, he persuaded me.

Q. Well. tell us how he persuaded you. A. Well, he says something to the effect like if I don't go along with this, they'll bury me, and he didn't intend to tie up his office, you know, to try this case.

Q. When you say they, you mean he was referring to the State of Connecticut? A. Yes, the State's Attorney, Mr. LaBelle.

MR. WADE: I think that's all I have.

CROSS EXAMINATION BY MR. LABELLE:

Q. Now, Dukes, in this case that you are here in prison on now, was only one of a number of charges that were pending against you at the time that you were sentenced, isn't that so? A. Yes, sir.

Q. And you did have some charges pending against you in Fairfield County? A. I think it was Farifield County, sir. I know he tried to get me — Mr. Zaccagnino tried to get me to plead to the charges, yes, sir, but the other charges, and I told him no.

Q. You had some charges pending in New Haven County? A. I don't remember exactly what county.

Q. Well, were there other charges? A. Yes, there was other charges.

Q. You also had some other cases pending in the Superior Court in Hartford at the time that you entered your plea in this case? A. Yes, sir, I think I did.

Q. No question about that? A. No.

Q. And one of them was the case that involved Sejerman and Baker? A. Yes, sir.

Q. The girls? A. Yes, sir.

Q. You recall that? A. Yes, sir, I recall that.

Q. And you were also charged in that same case with the girls? A. Yes, sir.

Q. And as I recall your testimony, Mr. Barlow had entered an appearance in that case for you? A. Yes, sir.

Q. Now, that case, as far as you are concerned had

nothing to do with this charge for which you were sentenced here?

MR. WADE: By that case, you mean the Sejerman?

Q. I'll withdraw the question. The Sejerman and Baker case, in which you were charged also, had no connection with the charges for which you are now serving this sentence?

A. No, sir, they are unrelated.

Q. Unrelated? A. Yes, sir.

Q. Now, if I recall your testimony correctly, you said that after talking to Mr. Delaney, you thought you had entered a plea of guilty, that you thought it was just a temporary guilty plea? A. Correct, sir.

Q. And after the guilty plea was entered, and the Court ordered a presentence report, did they not? A. Yes, sir.

Q. And as a matter of fact, you talked to the probation officer in connection with the report he was preparing?

A. Yes, sir, Mr. Capshaw.

Q. Now, did you tell Mr. Capshaw that your plea was only a temporary guilty plea, that you planned to withdraw it? A. Well, he told me that he heard that I was going to withdraw my plea.

Q. He told you that? A. Yes, sir.

Q. Did you tell him that it was only a temporary guilty plea? A. I told him I was undecided.

Q. Now, that was after May 16th, was it not? A. This was during the course of the probation investigation, sir.

Q. Yes, it was after you pleaded guilty. A. Yes, sir.

Q. So that you had to plead guilty in order for the probation report to be ordered? A. Right.

Q. Now, did you contact Mr. Fazzano at any time before June 15th? A. I contacted Attorney Fazzano approximately twenty-four hours before June 16th, to be precise, I can't pinpoint the exact time, but I figure it would be approximately twenty-four hours prior to June 16th, sir.

Q. Now, when you say you cantacted him, you talked to him on the phone, didn't you? A. Correct.

Q. And you had never met him? A. No, I never met him, sir.

Q. And on June 16th, the day that you were sentenced, Mr. Fazzano called my office, did he not? A. According to him, he did.

Q. Yes, and according to me, too.

Mr. WADE: Well, objection to that, your Honor. This is testimony coming from Mr. LaBelle at this point.

MR. LABELLE: Well, I'll withdraw that.

THE COURT: It may be stricken.

Q. On the morning of June 16th, you were present in Court, were you not, when I informed the Court that I heard from Mr. Fazzano? A. I don't know exactly what you said to the Court, Mr. LaBelle.

Q. Well, we told Judge Devlin — you told him and I told him — that you had contacted Mr. Fazzano?

A. I told Judge Devlin that I did contact Attorney Fazzano.

Q. As a matter of fact, you talked to him on the phone the night before, isn't that true? A. I don't know exactly when.

Q. Well, you said twenty-four hours before.

A. Well, I talked to him on several occasions, within twenty-four hours.

Q. Several times then, the day before, is that what you mean? A. Prior to June 16th, within twenty-four hours.

Q. But from May 16th to June 15th, you didn't talk to Mr. Fazzano? A. Well, I talked to — I was shopping for an attorney to handle this case, and I talked with numerous attorneys to take the case, and I finally got — was recommended to Mr. Fazzano, and he agreed to represent me.

Q. And that was June 15th? A. Yes, sir.

Q. Now, did you ever tell Mr. Zaccagnino that you were shopping around to get a lawyer? A. Oh, he knows this, yes.

Q. Did you tell him? A. Yes, sir, definitely.

Q. Did you tell him you were going to withdraw your plea? A. Well, he knew that I was totally unsatisfied with the plea.

Q. Well, that isn't my question. Did you tell Mr. Zaccagnino, between May 16th and June 15th, that you were going to ask the Court to withdraw your plea? A. To be exact, I would say no, directly. Indirectly, I did.

Q. Okay, is that the answer, no? A. I don't remember. I can't answer that, Mr. LaBelle.

Q. Isn't it a fact that on June 16th, when you were before the bench to be sentenced, was the first time you told

Mr. Zaccagnino you wanted to withdraw your plea?

A. Not before the bench. I think it was in the Courtroom, in the Superior Courtroom, I was sitting in the back of the room, and you sent him back to tell me to come up and plead to these other charges, and you would nolle them or throw them out — this is what he told me — and I told him no, I'm not going to plead to the charges.

Q. That's the first time you told him you were going to change your plea, some time in the courtroom that morning? A. I don't know. I can't answer that, sir, but he knew I wasn't satisfied.

Q. Well, isn't it a fact that the first time you told Mr. Zaccagnino you were going to change your plea was in the Courtroom the morning you were sentenced? A. That's been almost three years, Mr. LaBelle, and it's difficult to remember everything, you know, to pinpoint everything that was said during the course of the three years that elapsed.

Q. Now, let me ask you about the date that you entered your plea, on May 16th, isn't if a fact that on the morning of May 16th, and during the course of the morning, you had a lot of conferences with Mr. Delaney? A. Between the three of us, not directly with you, but you were standing over there, and he probably was over here, and I was standing over here, and he was from you to me.

Q. Well, there were a lot of conferences, weren't there?
A. I would say about ten minutes or so.

Q. Didn't you go out in the hall two or three times?
A. Well, all three of us was out in the hall.

Q. And didn't you go off somewhere with Mr. Delaney to talk after he talked with me? A. Right across the corridor from the Courtroom, and you were standing right at the door.

Q. And this was ready for trial that morning, was it not?
A. Yes, sir.

Q. No question that the witnesses were there?
A. I don't know who was there.

Q. Well, you saw all — Officer D'Onofrio and Detective Bolton, they were around? A. Certainly.

Q. They were witnesses in that case, weren't they?
A. They was more than witnesses.

Q. But there isn't any question that the case was ready for trial that day, as far as the State was concerned?
A. Well, that's what he said, he wasn't going to prolong it, they was ready to go forward this morning.

Q. By he, you mean Mr. Delaney? A. Yes, Mr. Delaney.

Q. Now, is it your claim you had taken medication so you didn't know what you were doing on that day?
A. Yes, sir. I was taking analysis, I was under examination at the Hartford Institute of Living, on Retreat Avenue, and I was taking medication from the doctor, Doctor Schwartz there, I think it's 15 Burton Street, Hartford, Connecticut.

Q. What kind of medication were you taking?
A. I think it was two kinds, and I purchased them with the subscription at Morris Pharmacy. I don't know exactly the name of them.

Q. You took that medication every day, did you?
A. Yes, sir.

Q. Not only the day you were in Court, every day?
A. Yes, sir.

Q. And you had been taking it for some time, had you?
A. Yes, sir.

Q. How long? A. I would say about — it was just after I came out of St. Francis Hospital, after being in there about three months, and I was doing things that I ordinarily wouldn't do, and he subscribed this medication for me, and I don't know exactly how long it was.

Q. Well, you were in St. Francis Hospital, weren't you, in 1966, isn't that so? A. Yes, sir, '66.

Q. August of '66? A. That's when I entered, because I stayed in I think about three or four months.

Q. You were shot? A. In the back, twice, yes, sir.

Q. And you went to St. Francis Hospital? A. Yes, sir.

Q. And after you got out of the hospital, the doctor prescribed some medication? A. Well, they let me out of the hospital after I stayed in there I think about three months, for me to stay on the street. I had a colostomy — you know what a colostomy is — and I had to go back, I would say in thirty days, and have another operation for them to put, you know, operate again, you know, put this back in. Now, the specific dates, I know it was during the latter part of '66.

Q. Well, is it a fact that you were taking this same medication from could we say January of '67? A. No, sir.

Q. When did you start taking it? A. After I came out of St. Francis Hospital.

Q. Back in '66 then? A. I would put it at say two months prior, or maybe less, before May 9th. That would be let's say April.

Q. Well, during the period that you were taking this medication, you were out on the street, you weren't hospitalized, other than this St. Francis hospitalization?

A. I was in the hospital and in jail, and frequently, I mean briefly, on the street. I wasn't on the street —

Q. Well, let's see if we can't pin down these dates. This offense that you were sentenced on here now, occurred on March 14, 1967, didn't it? A. Yes, sir.

Q. That's the narcotics part of it? A. Yes, sir.

Q. And you were arrested under that charge on March 14th? A. Yes.

Q. And you made bond on that? A. After a while, I finally made bond. Yes, sir.

Q. So that in May, when you were called into the Superior Court on your case, you were on bond?
A. Yes, sir, I was out on bond.

Q. And on May 16th, when you entered your plea of guilty, you were on bond? A. I just got out of jail, out of the hospital and jail, and then I just got out I think maybe a matter of a day or two, or maybe two days before I entered the plea.

Q. All right, I'll come back to that, but from May 16th, when you entered your plea, until June 16th, when you were sentenced, you were on bond? A. Briefly.

Q. Well, when weren't you on bond between May 16th and June 16th? A. Well, the way the State Policemen had me running around and putting me in jail, and the treatment that I received, I wasn't on the street hardly no time.

Q. Are you telling this Court that between May 16th and June 16th, you were in jail? A. Precisely, most of the time.

Q. For what charge? A. I don't even know. I can't answer that. They had me charged with breaking in a drug store in Bristol. I never had been in Bristol in my life.

Q. You were arrested on that charge on May 9th, weren't you? A. As I left the Courtroom corridor.

Q. On May 9th? A. That's right.

Q. And you made bond on that charge? A. Not just then. After they floored me and beat me in the Courtroom corridor, and took me down to Morgan Street, and after I was attempted to commit suicide, and was taken to the hospital, and stayed in the hospital, and then came out of the hospital, and went to Morgan Street and they charged me for the ruckus in the Courtroom there, and finally nolled like the other cases, and took me out to some town I never been in in my life, and charged me — I don't even know nothing about — just harrassment to detain me, that's all, to keep me from getting a new counsel.

Q. Didn't you get bond on that charge? A. Eventually I did.

Q. Were you on bond on May 16th? A. That specific day I was out on bond.

Q. Is it your claim that you were arrested again after May 16th? A. Yes, sir.

Q. And that you went to jail after May 16th?
A. Yes, sir.

Q. And you were in jail sometime between May 16th and June 16th? A. Yes, sir.

Q. You tell the Court when you were in jail.
A. I can't pinpoint the exact date. The record should

indicate when I was in jail, and in the hospital. I can't pinpoint the specific dates because it was, you know, almost three years —

Q. You were not on bond on June 2nd, were you — excuse me — you were not in jail on June 2nd? A. No, sir.

Q. You came into Court on June 2nd? A. Yes, I was making appearances to Court.

Q. You made it, didn't you? A. I always make it to Court.

Q. You were in Court on June 2nd in the Superior Court? A. Any time I'm supposed to go to Court, I make an effort to get to Court.

Q. Didn't you come to Court on June 2nd with Mr. Zaccagnino, when your sentencing was postponed for two weeks?

A. June 2nd, let me see — let me think back to June 2nd — I would say no. No, I wasn't in Court June 2nd.

Q. You better think this over straight. On June 2nd, weren't you in Court with Mr. Zaccagnino when your case had to be postponed because your probation report wasn't ready? A. You mind if I ask you one question, please?

Q. Answer that question. A. Well, I'm trying to clarify it the best I could.

MR. WADE: Well, if I might make a suggestion, your Honor, I think because this — the point Mr. LaBelle is making, perhaps the witness could be shown the part of the return that reflects the June 2nd appearance and see whether or not that refreshes his recollection at all.

THE COURT: Oh, I think he's entitled to cross examine as he pleases. If you want to rehabilitate him, you may do

that, Mr. Wade, if he needs rehabilitation. Overruled, for the record.

A. I'm trying to think of the day that the girls got sentenced, because I was not in Court the day they got sentenced, because I know that I wasn't in Court that specific day, because that's when I was told what was said about me, and so forth and so on, in Court, so I'm quite sure I wasn't in Court that day.

Q. All right. I want you to tell the Court how many days between May 16th and June 16th you spent in jail, 1967. A. I just can't recall the exact date, but I know that I was out briefly and going back to Court. I had to go and make appearances in two or three different Courts, on the same date, at the same time, and was making calls to the Court telling them that I would be late, and I was very busy with Court matters, going back and forth to Court during June 16th and the sentencing date.

Q. Did you tell this to Judge Devlin, that you were in jail between May 16th and June 16th, when you asked him to change your plea? A. I didn't say too much to the man. The confused state of mind I was in, what I said to him was very briefly. I told him that I was flabbergasted and I didn't know what happened, as baffled as I was, I didn't say too much to the man.

Q. You asked him to change your plea, didn't you?
A. I did, before imposition of the sentence.

Q. And he denied it? A. He denied it

Q. Did you tell him that you wanted to change your plea because you couldn't get a lawyer because you were in jail? A. I told Judge Devlin that I was flabbergasted and baffled of the proceedings at that time, I didn't know exactly what was going on, all the pressure was on me.

C

of attempte[illegible] a dangerou[illegible]
18, 1957, in H[illegible]ord?

MR. WADE: Objection, irrelevant.

THE WITNESS: I can't go that far back, Mr. LaBelle.

BY MR. LABELLE:

Q. You don't know? A. No, I don't know.

Q. Are you the same Charles Dukes who was convicted of breaking and entering with criminal intent in the Hartford Superior Court on February 10, 1961?

MR. WADE: Well, I offer the same objection, your Honor, and I'd ask this, through the Court. Is Mr. LaBelle planning to put the man's criminal record in? If so, I say put it in, and —

THE COURT: I can't tell Mr. LaBelle, nor can you, how to try his case.

MR. WADE: Well, then I'll object to him going down seriatim on these criminal cases.

THE COURT: You object to this as you did to the prior one. It's overruled. You may have an exception.

MR. WADE: May I understand that as the line continues —

THE COURT: You may object to each one.

MR. LABELLE: I claim it on the same basis, of credibility, your Honor.

THE WITNESS: Yes [illegible], I re[illegible]

MR. LABELLE: Are you the Charles Dukes?

THE WITNESS: Yes, sir.

MR. LABELLE: I'l rest, your Honor.

MR. WADE: That's all I have, your Honor.

THE COURT: Mr. Dukes, let me ask you a question. At the hearing on June 16th, is it your understanding as it is mine, that Mr. Zaccagnino represented to the Court that he had been -- and the words he used was "forceful" with you, is that right?

THE WITNESS: Yes, sir.

THE COURT: Now, did Mr. Zaccagnino have anything to do with the plea of guilty which entered on the earlier date of May 16th?

THE WITNESS: Yes, sir.

THE COURT: Weren't you in fact on that day represented by Mr. Delaney?

THE WITNESS: Yes, but all he told me was what Mr. Zaccagnino said, and he tell me, he said, he didn't know from nothing, he says, and he only got ten minutes, and that's not adequate time for him to prepare no defense to try this case. He says he can't try the case.

THE COURT: What I'm getting at is that on that par-

ticular date, when you entered your plea, Mr. Zaccagnino had nothing to do with you. You didn't even see him.

THE WITNESS: No, sir.

THE COURT: So that if there was any pressure, the word you used, or force, which he used, that would have been on the part of Mr. Delaney, would it not?

THE WITNESS: The misunderstanding, yes, sir.

THE COURT: I have no further questions. You can step down.

MR. WADE: Petitioner rests, your Honor.

Supreme Court of the United States

No. 71-5172 ~~-----, October Term, 19--~~

Charles O. Dukes,

Petitioner,

v.

Warden, Connecticut State Prison

On petition for writ of Certiorari to the Supreme ~~----------~~ Court of the State of Connecticut.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, ~~denied~~ granted.

November 9, 1971

IN THE

Supreme Court of the United States

No. 71-5172

CHARLES O. DUKES,
Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CONNECTICUT

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

No. 71-5172

CHARLES O. DUKES,
Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CONNECTICUT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported, *sub nomine, Charles O. Dukes v. Warden, Connecticut State Prison,* Conn. . A.2d , (33 Connecticut Law Journal No. 2, p. 14, July 13, 1971). (App. p. 48, et. seq.)

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on June 25, 1971, which judgment was announced on July 13, 1971, wherein it affirmed the decision of the Superior Court for Hartford County denying Charles O. Dukes' petition for habeas corpus. The petition for a writ of certiorari was filed on July 27, 1971, and was granted on November 9, 1971. The jurisdiction of this Court is invoked under the authority of 28 U.S.C.A. § 1257 (3).

QUESTIONS PRESENTED

(1) Did the Connecticut Supreme Court err in failing to hold that the petitioner's plea of guilty was involuntary in that it was not made with the effective assistance of counsel?

(2) Did the Connecticut Supreme Court err in failing to find as a matter of law that petitioner's plea of guilty was involuntary because it was made without the effective assistance of counsel due to a conflict of interest?

(3) Did the Connecticut Supreme Court err in affirming the denial of the petition for habeas corpus since an actual conflict of interest, apparent on the face of the record, rendered petitioner's plea of guilty involuntary?

(4) Did the Connecticut Supreme Court err in holding as a matter of law that the trial court made adequate inquiry into the voluntariness of petitioner's pleas of guilty?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner maintains that the judgment of the Connecticut Supreme Court affirming the denial of his petition for a writ of habeas corpus violates his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On October 6, 1969, petitioner, acting through his Special Public Defender, filed a petition for habeas corpus alleging that his detention in the Connecticut Correctional Institute, Somers, Connecticut, was illegal on the ground that his pleas of guilty were involuntary, were improvidently made and were not the product of his free and intelligent will, in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article First of the Constitution of Connecticut. (App. p. 1-3) A hearing was held on this petition at the Connecticut Correctional Institute on November 5, 1969, before the Superior Court (Levine, J.). On January 15, 1970, judgment entered in favor of the defendant and the petition for habeas corpus was dismissed. (App. p. 34-37) Thereupon, the petitioner, on January 22, 1970, requested certification for review by the Connecticut Supreme Court of questions raised in his petition. Certification having been granted, the petitioner appealed to the Connecticut Supreme Court. On June 25, 1971, the Connecticut Supreme Court affirmed the judgment dismissing the petition for habeas corpus, which decision was announced on July 13, 1971. (App. p. 58)

The petitioner was arrested in Hartford in March, 1967, and charged with a violation of the Uniform State Narcotic Drug Act and larceny—receiving stolen goods. He was represented in the Fourteenth Circuit Court by the law firm of Zaccagnino, Linardos and Delaney, which firm also appeared for him in the Superior Court for Hartford County. Members of this law firm at that time included Peter J. Zaccagnino, Esq.; Robert Delaney, Esq.; and George Linardos, Esq. Both Mr. Zaccagnino and Mr. Delaney handled the matter on different occasions for the petitioner. (App. p. 38).

On May 9, 1967, the petitioner appeared before the Superior Court for Hartford County, Johnson, J., accompanied by Mr. Zaccagnino. (App. p. 8, 39) Prior to that date the petitioner had discussions with regard to his plea during which time Mr. Zaccagnino advised him he should plead

guilty. However, the petitioner maintained that he was innocent and would not agree to plead guilty.

Although the case was set down for trial on May 9, 1967, Mr. Zaccagnino asked the court for permission to withdraw from the case because there was a "slight conflict" between Mr. Zaccagnino and his client. (App. p. 9, 39). The State's Attorney indicated that he had no objection to the withdrawal of counsel provided that other counsel appeared ready to go to trial that day. There followed the filing and argument of several preliminary motions, all of which were argued by Mr. Zaccagnino and disposed of by the court from the bench. (App. p. 10-17).

Mr. Zaccagnino then reiterated his request to withdraw as counsel and asked for a continuance of one day to enable petitioner to obtain new counsel. The court refused to permit Mr. Zaccagnino to withdraw but did grant a one day continuance to enable petitioner to obtain other counsel. The petitioner entered a plea of not guilty and elected a trial by a jury of 12. (App. p. 19-21).

Upon leaving the courtroom the petitioner was arrested by Hartford Police and taken to the Hartford Police Station. As a result of taking some pills, he was admitted to McCook Hospital on May 11, 1967, and discharged on May 13, 1967. (App. p. 40).

On May 16, 1967, the petitioner again appeared before the Superior Court for Hartford County, Johnson, J., accompanied by Mr. Zaccagnino's partner, Mr. Delaney. (App. p. 23). At this time petitioner plead guilty to the original information plus an amendment thereto charging him with larceny. Mr. Delaney was familiar with the case having talked to the petitioner several times about it and having handled it in the Circuit Court. Between May 9, 1967, and May 16, 1967, Mr. Zaccagnino and Mr. Delaney discussed the case many times and both of them agreed they should try to convince the petitioner to plead guilty. During this period Mr. Zaccagnino tried to convince the petitioner to plead guilty. (App. p. 40).

Prior to the entry of the guilty pleas, the court made inquiry as to the voluntariness thereof as follows:

"Mr. LaBelle: Yes, Your Honor, and I would like to ask if inquiry would be made as to change of plea and that he be put to plea on both the original information again and this amendment also. Excuse me, Your Honor. The record also ought to appear that Mr. Delaney is here with him today and he is in the office of Mr. Zaccagnino. I think the Court might inquire with respect to the representation since there had been some indication that counsel had asked to withdraw the other day."

"The Court: Well now, Mr. Dukes, I want to be sure that everything is in order here. I was present the other day, of course, when you were presented and the problem came up about an attorney. Now I want, now Mr. Delaney is here, are you fully satisfied with the services he is rending you, Mr. Dukes?"

"The Accused: Yes, sir."

"The Court: You are. And now you know, of course, Mr. Dukes, that—you know of course that the State of Connecticut has the burden of proving you guilty on the charge and you are free to go to trial but you still wish to change your plea, is that correct?"

"The Accused: Yes, sir."

"The Court: And do you do this of your own free will, Mr. Dukes?"

"The Accused: Yes, sir."

"The Court: And you know the probable consequences of it?"

"The Accused: Yes, sir."

"The Court: Very well, and no one has induced you to do this, influenced you one way or the other? You are doing this of your own free will?"

"The Accused: Yes."

"The Court: Very well then. We will accept the change of plea."

The case was contined to June 2, 1967, for sentencing. (App. p. 24-26, 41-42)

On June 2, 1967, petitioner appeared with Mr. Zaccagnino before the Superior Court for Hartford County, Devlin, J., for sentencing, but the case was continued to June 16, 1967, because the probation report was not finished and because matters to be consolidated from other counties regarding petitioner had not been sent to Hartford. (App. p. 27, 42). On June 16, 1967, petitioner again appeared before the Superior Court of Hartford County, Devlin, J., with Mr. Zaccagnino for sentencing. At that time he advised the court that he wanted to withdraw his guilty pleas and that he had retained other counsel. The State's Attorney advised the court that Attorney Alphonse Fazzano of New Haven had called his office that morning but had not entered an appearance. He objected to a further delay in the proceedings. The request for permission to change pleas was denied, whereupon, after an argument on sentence by Mr. Zaccagnino, the petitioner was sentenced to the State Prison for not less than 5 nor more than 10 years on the First Count and for 2 years on the Second Count. (App. p. 28-33, 42-43, 74).

Ancillary to these proceedings, Mr. Zaccagnino was representing two girls by the name of Sandra Baker and Andrea Sejerman for offenses unrelated to the charges to which the petitioner plead guilty. He was a codefendant in the same case with Sandra Baker and Andrea Sejerman and they were all charged with conspiracy to obtain money by false premises. In that case petitioner was represented by Attorney Boce Barlow. (App. p. 43, 59-62).

On April 18, 1967, the two girls appeared before the Superior Court for Hartford County, Devlin, J., represented by Mr. Zaccagnino and plead guilty to two counts of conspiracy to obtain money by false pretenses each. On June 2, 1967, the two girls appeared again before the Superior Court for Hartford County, Devlin, J., the same judge who was to sentence petitioner two weeks hence, with Mr. Zaccagnino for sentencing. (App. p. 43, 59-62).

During his remarks to Judge Devlin on behalf of the Baker and Sejerman girls, Mr. Zaccagnino told the court that these girls had come "under the influence of Charles Dukes" who had led them astray. He pointed out that because of their cooperation "with the State Police they capitulated Dukes into pleading guilty." He noted also that because of their cooperation Dukes would very "shortly be removed from society." He placed the blame for the offenses committed by the girls on Dukes saying that he was "the most culpable since he had all the instruments with which to dupe the girls." (App. p. 43-44, 68-71).

Whereupon the two girls were sentenced to one year in jail, the execution of which was suspended after six months with probation for three years. (App. p. 72).

SUMMARY OF ARGUMENT

This brief deals with the question of whether or not a plea of guilty entered by a criminal defendant is rendered involuntary, and therefore void, by virtue of the fact that defendant's counsel had a conflict of interest which thereby denied him the effective assistance of counsel guaranteed him by the United States Constitution.

Petitioner contends that at the time he entered his plea of guilty his attorney was representing two girls who had allegedly been involved with the petitioner in other criminal offenses unrelated to the offense for which he is now imprisoned. When the two girls appeared before the trial judge for sentencing, petitioner's counsel heaped blame upon his shoulders for the conduct of the girls. Two weeks later petitioner appeared before the same judge for sentencing with the same attorney.

It is contended that a conflict of interest such as was manifested in this case is sufficient as a matter of law to render the petitioner's plea of guilty involuntary since it goes to the heart of the representation by petitioner's attorney. It is further maintained that an actual conflict of interest was apparent on the record so as to render the plea

of guilty void and that the trial judge failed to make adequate inquiry to determine the voluntariness of the plea.

ARGUMENT

I

A PLEA OF GUILTY IS SUBJECT TO JUDICIAL REVIEW BY WAY OF HABEAS CORPUS TO DETERMINE THE VOLUNTARINESS THEREOF.

Ordinarily a plea of guilty constitutes a waiver by the accused of any defect which is not jurisdictional. It amounts to a confession of guilt in the manner and form as charged in the indictment or information. An accused, by pleading guilty, waives all defenses other than that the indictment charges no offense. He also waives the right to trial and the incidents thereof and the constitutional guarantees with respect to the conduct of criminal prosecutions. *Brisson v. Warden*, 25 Conn.Supp. 202, 200 A.2d 250 (1964). The binding effect of a guilty plea upon all defenses that could have been raised at trial has been accepted in both state and federal decisions.

Since the guilty plea, by its very nature, cuts off further examination by the court of the facts surrounding the crime charged, it has been held that the circumstances attendant upon the entry of the guilty plea are susceptible to a hearing upon a petition for habeas corpus to determine the legality of the petitioner's conviction. In *Doran v. Wilson*, 369 F.2d 505, 507 (9th Cir. 1966) the court held that a petitioner for habeas corpus was entitled to a hearing in spite of his guilty plea, saying:

> When a defendant voluntarily and knowingly pleads guilty at his trial, this constitutes a waiver of all nonjurisdictional defenses . . . . The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. The rule has been repeatedly followed by this court. But there is ano-

> ther side to this legal coin. We have several times held that a guilty plea 'induced' by a coerced confession *or in some other respect not truly voluntary* cannot stand. The basis for these decisions is that a guilty plea must not be a product of violation of fundamental constitutional rights. (Emphasis added.)

Similarly, the Pennsylvania Supreme Court held that the voluntariness of a guilty plea was properly the subject of inquiry in a Petition for Habeas Corpus in *Commonwealth ex rel West v. Myers*, 423 Pa. 1, 222 A.2d 918, 921 (1966) saying:

> The concept of fairness and justice embodied in the due process clause of the Fourteenth Amendment to the Constitution of the United States is incompatible with the practice of permitting convictions based upon guilty pleas not made voluntarily . . . and no plea can be viewed as voluntary that is the product of ignorance.

The United States Court of Appeals for the Second Circuit has affirmed the rule that the facts surrounding a guilty plea should be placed on the record by means of a hearing on a Petition for Habeas Corpus in a case arising in Connecticut. In *Trotter v. United States*, 359 F.2d 419 (2d Cir. 1966), on remand 255 F.Supp. 55 (U.S.D.C. Conn. 1966), the petitioner, having plead guilty to a charge of selling heroin, sought habeas corpus on the grounds that his guilty plea was "coerced" by promises of a suspended sentence made by his court-appointed counsel and an Assistant United States Attorney. The United States District Court denied the petition without a hearing and simply on the record. However, the Court of Appeals reversed and remanded the case, stating that the petitioner was entitled to be heard on the facts surrounding his guilty plea. (Note: On remand conflicting evidence about a "deal" was presented by both sides. Judge Timbers, having heard the evidence, resolved the question in favor of the government on the basis of credibility.)

In another Connecticut case, the United States Court of Appeals for the Second Circuit reiterated the principle that a plea of guilty tainted by coercion, what ever the form, cannot stand. In *United States ex rel Siebold v. Reincke*, 362 F.2d 592, 593 (2d Cir. 1966) the court said:

> A conviction will not be sustained if it rests upon a plea of guilty which is the result of coercion, nor perhaps, if the plea of guilty resulted from other violations of constitutional rights.

Petitioner contends that the word "coercion" is one of art connoting the concept that the plea is a forced one in that it is not entirely the product of one's free and intelligent will. Since "a plea of guilty is, in effect, merely a confession", *State v. Gargano*, 99 Conn. 103, 121 Atl. 657 (1923) should not the same high standards employed by the court in ruling on the admissibility of a confession on the merits be applied with equal vigor in examining the events surrounding what amounts to a judicial confession? The test for the admissibility of confessions is that the confession must be the "voluntary product of a free and unconstrained will under the Fourteenth Amendment," *Haynes v. Washington*, 373 U.S. 503, 514 (1963). The same free and unconstrained will must also be the test for determining whether a guilty plea can stand.

This court has held that a plea of guilty may be collaterally attacked in a post-conviction hearing by a defendant whose allegations of constitutional deprivation raise factual issues and are neither "vague, conclusory, or palpably incredible," *Machibroda v. United States*, 368 U.S. 487, 495 (1962), nor "patently frivolous or false," *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116, 119 (1956). As was succinctly stated in *Machibroda, supra:*

> A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. 368 U.S. at 493.

See also *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Palmer v. Ashe*, 342 U.S. 134 (1951).

In *McMann v. Richardson*, 397 U.S. 759 (1970) this court held that a defendant's plea of guilty based on reasonbly competent advice is an intelligent plea not open to attack as being involuntary on the ground that his counsel may have misjudged the admissibility of his confession. However, in so holding the court enunciated the guideline that should govern trial judges in maintaining the standards of performance by counsel in their courtrooms, saying in 397 U.S. at 770-771:

> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts *with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.* (Emphasis added.)

From the foregoing discussion it is clear that the voluntariness of a plea of guilty is the proper subject matter of a petition for habeas corpus. Obviously, the central question is to determine whether or not the plea was the product of the petitioner's free and voluntary state of mind. Ordinarily state of mind would be a question of fact to be resolved

by the trier of fact. However, petitioner herein has set forth the law at some length in order to show the breadth of review by appellate courts on the issue of voluntariness. As was pointed out in *Johnson v. Wilson*, 371 F.2d 911 (9th Cir. 1967), the effectiveness of counsel may, as a matter of law, be a determining factor in deciding whether or not a plea of guilty is truly voluntary. As will be noted below the petitioner was denied the effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution in that a conflict of interest existed both in law and in fact on the part of his counsel.

II

THE COURT ERRED IN FAILING TO CONCLUDE THAT PETITIONER'S PLEA OF GUILTY WAS INVOLUNTARY.

A. Representation of More Than One Criminal Defendant Whose Interests are Adverse by a Single Attorney Constitutes a Conflict of Interest and a Denial of the Effective Assistance of Counsel.

The Sixth Amendment to the United States Constitution and Article First, Section 8 of the Connecticut Constitution guarantee to every citizen the right to the assistance of counsel in any criminal prosecution. The United States Supreme Court has long held that the term "assistance of counsel" means "effective" assistance of counsel, *Powell v. Alabama*, 287 U.S. 45, 71 (1932); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Reece v. Georgia*, 350 U.S. 85, 90 (1955) In *Glasser v. United States*, 315 U.S. 60, 70 (1942) wherein the defendant was himself a former Assistant United States Attorney, the court extended the effective assistance of counsel rule to preclude dual representation where a conflict of interests exists, saying:

> . . . the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously repre-

> sent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

The court goes on to say that a heavy responsibility rests on the trial judge to insure that the accused is receiving the effective assistance of counsel. *Id.* at p. 71. In the present case the trial judge who accepted the guilty plea heard petitioner's counsel say he wanted to withdraw because there was a "slight conflict" between him and his client, yet the court did nothing to explore that situation. Then, the trial judge who was to sentence petitioner, having previously heard his counsel heap blame upon him and faced with a request to withdraw his guilty plea and to obtain new counsel, made no effort to insure that petitioner had, and was receiving, the effective assistance of counsel.

Since *Glasser,* the courts both state and federal, have consistently held that where one attorney represents more than one defendant whose interests conflict, whether the attorney be appointed or retained, it is a denial of effective assistance of counsel and is, therefore, error. In *Campbell v. United States,* 352 F.2d 359, 360 (D.C. Cir. 1965), Campbell and a co-defendant, Glenmore, were represented by one retained attorney at their trial on charges of housebreaking and petit larceny. During the trial the attorney virtually ignored the defendant, Glenmore, placing his major emphasis on the defense of Campbell. The court reversed Glenmore's conviction on the sole ground that one attorney representing both defendants rendered his service to Glenmore much less effective. Once again the court placed the duty on the trial judge to make a determination of the adequacy of representation saying:

> Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel. We

> must indulge every reasonable presumption against the unimpaired assistance of counsel.

Two years later the Court of Appeals for the District of Columbia Circuit again reviewed the conflict of interest question in *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967). The defendant's conviction was reversed on the ground that he had been denied the effective assistance of counsel since his court-appointed counsel represented both him and a co-defendant. The court held there was no distinction between court-appointed counsel and retained counsel insofar as the rule set forth in *Campbell, supra*, is concerned.

However, the court went on to consider whether the defendant was prejudiced by the joint representation. In deciding this issue, the court took as its guideline the admoniton in *Glasser v. United States, supra*, that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 76. It went on to say that only "where we find no basis in the record for an informed speculation that appellant's rights were prejudicially affected can the conviction stand." In the present case the derogatory remarks of counsel about his client, on the record, are more than a sufficient basis for finding prejudice.

The United States Court of Appeals for the Fourth Circuit went even further than the D. C. Circuit in holding that a conflict of interests amounted to a denial of the effective assistance of counsel. In *Sawyer v. Brough*, 358 F.2d 70, 73 (4th Cir. 1966), a habeas corpus proceeding attacking a conviction for robbery, the court reversed the conviction and remanded the case, saying:

> The salient fact remains that divergent interests did exist, and therefore an opportunity was presented for the impairment of Sawyer's right to the unfettered assistance of counsel. It is not necessary that Sawyer delineate the precise manner in which

> he has been harmed by the conflict of interest; *the possibility of harm is sufficient to render his conviction invalid.* (Emphasis added.)

In *Sawyer* the court is concerned with the mere potential for a conflict of interest. In the present case it is clear from the remarks of Attorney Zaccagnino that a conflict of interest in fact existed. The petitioner was therefore deprived of his right to effective assistance of counsel.

In *People v. Chacon,* 73 Cal. Rptr. 10, 477 P.2d 106 (1968), four co-defendants accused of murder were represented by a court-appointed attorney who had been out of law school some six months. Prior to the time of trial two of the accuseds, Chacon and Noah, advised the court they wanted to represent themselves. Their appointed attorney was to continue to represent the defendant Meyers. However, when the trial was about to commence Chacon and Noah changed their minds and agreed to have Mr. Lopez represent them. They were convicted and subsequently sentenced to death. Under California law the death penalty is imposed by the jury.

The court reversed the convictions of all three defendants on the ground that the trial judge had refused to provide separate counsel for each. In writing the opinion for the court, Traynor, J., said in 447 P.2d at 111:

> The right to counsel at trial guaranteed by the Sixth Amendment of the United States Constitution (*Gideon v. Wainwright* (1963) 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 709) and Article I, Section 13 of the California Constitution does not include an automatic right to separate counsel for each co-defendant. One counsel may represent more than one defendant so long as the representation is effective. (*Powell v. Alabama* (1932) 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158). Effective assistance of counsel is assistance 'untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interest'. (*Glasser v. United States* (1942) 315 U.S. 60, 70, 62 S.

Ct. 457, 465, 86 L.Ed. 680; *People v. Douglas* (1964) 61 Cal.2d 430, 437, 38 Cal. Rptr. 884, 392 P.2d 964). If counsel must represent conflicting interests or is ineffective because of the burdens of representing more than one defendant, the injured defendant has been denied his constitutional right to effective counsel. (*Glasser v. United States, supra; People v. Robinson* (1954) 42 Cal.2d 741, 745-48, 269 P.2d 6; *People v. Lanigan* (1943) 22 Cal.2d 569, 576-577, 140 P.2d 24, 148 A.L.R. 176; *People v. Douglas, supra; People v. Donohue* (1962) 200 Cal.App.2d 17, 24, 19 Cal. Rptr. 454).

The petitioner contends that a clear conflict of interest existed between his case and that of the Sejerman and Baker girls. After reviewing the record, the time sequence of their respective court appearances and the remarks made about him at the sentencing of the girls it is clear that the interests of the petitioner were not the sole and exclusive interests of his attorney. What greater prejudice could there be than for his attorney to heap blame upon the petitioner's shoulders and then appear two weeks later before the very same judge to implore the court's mercy on sentencing. It is apparent that at the time of the entry of his plea, the petitioner could not receive the effective assistance of counsel from Mr. Zaccagnino. How could his plea be based on advice from one who did not have his sole and exclusive interests at heart? The court was in error in making him proceed with an attorney he did not want and later in refusing to permit him to withdraw his guilty plea and to obtain new counsel. The plea should be set aside.

B. A Guilty Plea Resulting From Ineffective Assistance of Counsel in Involuntary and Should Be Set Aside.

As has previously been pointed out, a plea of guilty is merely a confession, *State v. Gargano*, 99 Conn. 103, 121 Atl. 657 (1923), and as such must be the product of a free and unconstrained will under the Fourteenth Amendment, *Haynes v. Washington*, 373 U.S. 503, 514 (1963). If the

plea of guilty is coerced or "in some other respect is not truly voluntary" it cannot stand. *Doran v. Wilson,* 369 F. 2d 505, 507 (9th Cir. 1966); *United States ex rel Siebold v. Reincke,* 362 F.2d 592, 593 (2d Cir. 1966). It is well established that where a guilty plea resulted from ineffective assistance of counsel due to a conflict of interest the plea will not be permitted to stand.

In *Commonwealth v. Cullen,* 216 Pa. Super. 23, 260 A. 2d 818, 820 (1970) the appellant and a co-defendant were represented by one counsel. They pleaded guilty to some charges and not guilty to others but were convicted on all but one count. At sentencing the attorney represented one defendant as less guilty than the other, saying that he had been led by the other. However, they both received the same sentence. The court found this to be a conflict of interest, vacated the sentence and permitted the guilty pleas to be reopened.

In so doing the court in a footnote says that the remarks of counsel at the time of sentencing raise a "serious question with respect to his representation on the plea itself". The court reasons that the attorney might not have given his full measure of devotion with regard to the decision to plead guilty but refuses to speculate on same concerning itself solely "with the potentiality of harm", saying:

> If counsel has a conflict of interest in his representation of two co-defendants we are required to reverse the convictions of the injured parties without a detailed examination of the record. If there is a 'possibility of harm', it is incumbent upon us to assure that the injured party is retried while represented by counsel whose service is not burdened by a conflict.

The similarities between *Cullen* and the instant case are apparent. Attorney Zaccagnino told Judge Devlin that the Baker and Sejerman girls "came under the influence of Charles Dukes" and that he was "the most culpable person because he had all the instruments with which to dupe" them. Two weeks later he was back in front of the same

judge arguing on behalf of the petitioner after the court had denied the petitioner's motion to set aside the guilty plea. A more blatant conflict of interest could not exist. It goes without saying that at that point the trial judge should have interrupted the sentencing of the petitioner to advise him of his counsel's remarks and to insure that he had received effective and adequate representation by his counsel. In light of petitioner's own attempt to set aside his guilty plea at the time of sentencing and to obtain new counsel, the court should have been especially alert to problems between client and counsel.

In *United States ex rel Taylor v. Rundle,* 305 F.Supp. 1036, 1039 (E.D. Pa. 1969) the defendants Taylor and Ingram robbed a store and were caught. Ingram hired an attorney and Taylor some time thereafter "went along" with Ingram's choice. Both plead guilty and at the time of sentencing Taylor testified that he was the more culpable of the two. The attorney did nothing to soften this statement and indeed played upon it in an attempt to mitigate Ingram's sentence. The court granted Taylor's petition for a writ of habeas corpus on the ground that he had been denied the effective assistance of counsel due to a conflict of interest. The plea of guilty was set aside and the State was given sixty days either to appeal the decision or retry Taylor. In granting the writ the court followed the reasoning that petitioner in the present case urges upon this court:

> It is apparent that the attorney's plan in this case was to place the onus of the offense on the offense of the relator, thereby obtaining a lighter sentence for his co-defendant who was his original client. In order to carry out his plan, the attorney had both defendants plead guilty at the proceeding in question. Hence petitioner's plea was substantially affected by the attorney's conflict of interest and the conflict is sufficient to vitiate the entire proceeding on December 15, 1964, including the entering of a plea of guilty by petitioner at that time. A defendant, in deciding whether to plead guilty, is

> entitled to the advice of an attorney untrammeled by conflicting interests.

It is interesting to note the court's concern with the substantial effect of the attorney's conflict of interest on the guilty plea. The entire question of prejudice was analyzed at length by Judge J. Skelly Wright in *Lollar v. United States*, 376 F.2d 243, 246 (D.C. Cir. 1967). After reviewing the authorities, some of which require actual prejudice, others suggesting the mere possibility of prejudice is sufficient, the court takes as its guideline in *Glasser v. United States, supra*, that:

> the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. 315 U.S. at 76.

The court goes on to point out that if it is claimed that the prejudice resulting from the conflict of interest is harmless it must be shown beyond a reasonable doubt to be harmless, relying on *Chapman v. California*, 386 U.S. 18 (1967).

In the present case the court had two opportunities to allow petitioner to obtain new counsel—when Attorney Zaccagnino himself moved to withdraw due to a "slight conflict" and at the time of sentencing when petitioner moved to set aside his guilty plea and to obtain new counsel. What harm was there in granting either of these requests. The interests of justice would indeed have been better served had the court made inquiry into the situation and allowed the petitioner to proceed with other counsel of his own choosing.

C. Mere Knowledge of Joint Representation by his Attorney Does not Deprive an Accused of the Right To Raise the Issue of an Actual Conflict of Interest on Review.

In his brief in opposition to the petition for certiorari in the present case, respondent argues that petitioner cannot now complain of conflicting interests on the part of his attorney since he had knowledge of Mr. Zaccagnino's other

representation at the time of his retainer, relying on *Ciarelli v. State*, 441 S.W.2d 695, 697 (Mo. 1969); *People v. Stack*, 23 Ill.2d 35, 177 N.E.2d 98 (1961); and *United States ex rel Kachinski v. Cavell*, 311 F.Supp. 827 (M.D. Pa. 1969). However, it has been held that a defendant is unlikely to be sufficiently aware of his right to object to a possible conflict of interest so that "some judicial initiative is probably advisable when the possibility of prejudicial conflict is apparent to the trial court." *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965); *Olshen v. McMann*, 378 F.2d 993 (2nd Cir. 1967); *Wynn v. United States*, 275 F.2d 648 (D.C. Cir. 1960).

It is clear from the record that Judge Devlin, having heard the remarks of Attorney Zaccagnino while sentencing the Baker and Sejerman girls two weeks earlier, had a duty to apprise the petitioner of his rights when he came before him for sentencing. It cannot be presumed that just because the petitioner was aware of the joint representation he was aware that he would be used by his attorney as a foil for the girls.

Indeed where does the responsibility of the trial judge come into play to insure that the accused is being afforded the effective assistance of counsel to which he is entitled? At what point and in what manner should the trial judge "strive to maintain the proper standards of performance by attorneys who are representing defendants in criminal cases before their courts?" *McMann v. Richardson, supra*, 397 U.S. at p. 770.

In *Kent v. State*, 11 Md. App. 293, 273 A.2d 819, 823 (1971) the appellant's co-defendant, one Thomas Mackall, had been tried and convicted of the same crimes charged to the appellant, but at the time of the latter's trial Mackall had not yet been sentenced. Mackall had been represented at his trial by the same attorney representing the appellant. When Mackall was called as a witness for the state in the appellant's trial, the attorney tried to convince Mackall not to testify. However he elected to do so. The appellate

court found that counsel was significantly impaired in his ability to cross-examine Mackall due to the joint representation saying:

> . . . the trial judge should have ascertained for the record whether appellant knowingly and willingly was consenting to the dual representation at a time when he would have been entitled to separate counsel.

Similarly in *Commonwealth v. Booker*, 280 A.2d 561 (Pa. Super. 1971) the court held that an affirmative duty rests upon the trial court to insure that if the accused is waiving his right to have separate counsel that such waiver is knowingly and intelligently made:

> "To waive a right intelligently, one must be aware of the considerations that make it a wise or unwise choice. '[B]efore a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.' * * * The trial court, however, should not rely upon counsel's explanation alone. 'While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' * * * *'The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both.* An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks.' * * *
>
> "In order for an accused to intelligently evaluate his predicament, he should know what a lawyer representing him alone could do. He should know what a lawyer who represents another codefendant

> may be hindered from doing. The court should tell the accused that if he cannot afford to hire another lawyer, then he will be represented by a court-appointed attorney." (Emphasis added.)

See also *McIver v. United States*, 280 A.2d 527 (U.S. App. D.C. 1971) requiring the trial judge to make an affirmative, on the record, determination of an intelligent waiver, relying on *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967).

If the court cannot say that the petitioner was not prejudiced by what was said to the sentencing judge then the conviction must be set aside. *Thompson v. Rundle*, 294 F. Supp. 933 (E.D. Pa. 1968). Where a conflict of interest exists the petitioner does not waive his right to challenge the same by not objecting to it at trial. He will not be presumed to have intentionally relinquished a known right. *Sawyer v. Brough*, 358 F.2d 70, 73 (4th Cir. 1966). If the petitioner has not been advised of the dangers he cannot be said to have waived the right. *Lollar v. United States, supra.*

The record in the present case is devoid of any indication that the petitioner knew his attorney was going to argue before the judge who was to sentence him that he had led two girls down a path of crime. The sentencing judge having heard this allegation had a duty to advise petitioner of his counsel's remarks. Absent this advice he should have let him reopen his guilty plea and proceed on the merits with other counsel as he had requested. Therefore the guilty plea should now be set aside.

III

THE TRIAL COURT FAILED TO MAKE ADEQUATE INQUIRY ON THE RECORD TO DETERMINE THE VOLUNTARINESS OF THE GUILTY PLEA

From the foregoing discussion it is by now clear that a valid plea of guilty is indispensible to the entry of a valid judgment of guilty which is dependent on such a plea. If the guilty plea in any way is deprived of its char-

acter as a voluntary act, the conviction based upon the plea is open to collateral attack. *Machibroda v. United States*, 368 U.S. 487, 493 (1962). The importance to be attached to a plea of guilty was perhaps best summed up in *Brady v. United States*, 397 U.S. 742, 748 (1970), wherein this Court said:

> "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

In *McCarthy v. United States*, 394 U.S. 459 (1969), Rule 11 of the Federal Rules of Criminal Procedure was interpreted to require that the judge determine affirmatively from the defendant's own lips that he knows that the plea need not be made, that he knows the consequences of the plea and that he is acknowledging acts sufficient to establish that he is guilty of the crime charged. The court cannot rely on statements by counsel that the defendant knows these things but must itself supply the defendant with the necessary information and inquire into his comprehension.

In *People v. Seaton*, 19 N.Y.2d 404, 227 N.E.2d 294, 295 (1967), the court overturned a conviction resulting from a guilty plea because the trial judge had failed to make adequate inquiry of the defendant to see that she understood the consequences of her waiver and that she in fact

committed an act which would serve as the basis for her plea. The ends of justice are better served by such an inquiry as the court pointed out:

> "Although such questioning may deprive the guilty plea process of some of its efficiency, it has been well said that these inquiries nonetheless take far less time and are far less demanding of criminal justice resources than full scale trials. The benefits derived for defendants and for the system far outweigh the loss in efficiency. First and foremost, inquiry ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead.

Petitioner contends that Judge Johnson's inquiry is inadequate to ensure that he knew the full consequences of his plea and that he actually committed crimes at least as serious as the ones to which he plead guilty. It is not enough that the court ask the accused if he knows the "probable consequences" of his plea and accept a simple "Yessir". The court should ask the accused what the maximum and minimum penalties are and if he does not know, so advise him. The record is devoid of any facts drawn from the petitioner's lips which show that he committed the crimes charged. In view of the previous representation by petitioner's counsel of the "slight conflict" the trial court should have explored this area to satisfy both itself and any reviewing court that a conflict did not in fact exist. This court cannot presume from such a sketchy inquiry that all the blanks are filled in by the magic word "Guilty".

This Court, in effect, incorporated the requirements of Federal Rule 11 into the Fourteenth Amendment by its 1969 holding that the validity of a guilty plea cannot be presumed from a silent record. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the court said that because the tender of a plea of guilty amounts to a waiver of several important procedural rights, the fact of and grounds for waiver must be in the record before the validity of the waiver will be accepted. Petitioner contends that in order to make a satis-

factory record there should be a satisfactory waiver hearing in the first instance.

There are two guidelines which the trial judge may look to in making his inquiry into the voluntariness of the guilty plea. Rule 11 of the Federal Rules of Criminal Procedure provides:

> "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

The last sentence of Rule 11 requiring a determination that there is a factual basis for the plea is honored more in its breach than application by trial judges. How simple it is to elicit from the defendant enough facts to make a record showing the basis for the plea. The petitioner contends that for this court to uphold the inquiry made by Judge Johnson would be to establish a standard for inquiry upon a plea of guilty that is woefully inadequate and does justice neither to criminal accuseds nor to our criminal procedure.

The other guide for the trial judge may be found in the Minimum Standards established by the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (Approved Draft 1968). Section 1.4 requires the court before receiving a plea to address the defendant personally (1) to determine that he understands the nature of the charge; (2) to inform him that by a plea he waives the right to a jury trial; and (3) to inform him of the possible maximum and any mandatory

minimum charge on the offense, and of any additional or different punishment stemming from a prior conviction of crime. The court is then not to accept a plea of guilty or *nolo contendere* without determining it to be voluntary (§ 1.5), which is, of course, the constitutional mandate. The court is to ascertain whether the tendered plea is the result of what the Standards call "plea discussions" and a "plea agreement". If the prosecutor has agreed to seek concessions in sentence or charge, the court is bound to inform the defendant that it is not bound by the prosecutor's recommendations. The court must then find out from the defendant himself whether any promises, force or threats were used to induce the plea. Finally the court must also ascertain that there is a "factual basis" for the plea (§ 1.6).

This last requirement of the determination of a factual basis was inherent in *North Carolina v. Alford*, 400 U.S. 25 (1970) wherein it was held that a plea of guilty did not lose its voluntary character when entered to avoid a harsher penalty if the trial judge satisfied himself and the record that there was sufficient evidence to sustain a finding of guilty if the matter were tried to a conclusion. The Court maintained its position in weighing the character of the plea that:

> "the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."

Of course in weighing and choosing from among those alternative courses of action, an accused must be assured of the undivided devotion of his counsel who should spell out for him the choices available and the consequences thereof.

A review of Judge Johnson's inquiry prior to the entry of petitioner's guilty pleas reveals how it fails to measure up to the above standards. It is not enought for the court to ask a series of leading questions to which answers are parroted back. Why did the court not tell the petitioner

of the possible penalties? Why not advise him of the elements of the offense that the state must prove? Why not elicit enough facts to support the plea? What harm was there in asking these few simple questions? How much more time would it take?

Petitioner contends that the record is inadequate to support a presumption that his pleas were voluntary. Coupled with the other factors discussed above, this skimpy record supports his claim that the pleas of guilty should be set aside. If the court shirks its responsibility to make a thorough and searching inquiry into the voluntariness of the plea of guilty, then an integral part of the due process guaranteed every accused has been denied.

IV

THE COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT PETITIONER'S PLEA OF GUILTY WAS INVOLUNTARY

The thrust of this claim of error is that the court erred as a matter of law in failing to hold the petitioner's pleas of guilty to be involuntary as a matter of law. It is clear from the foregoing discussion that representation of more than one defendant whose interests are adverse by a single attorney constitutes a conflict of interest and a denial of the effective assistance of counsel. *Glasser v. United States, supra; Campbell v. United States, supra; Sawyer v. Brough, supra; People v. Chacon, supra.* A guilty plea resulting from such ineffective assistance of counsel is involuntary as a matter of law and should be set aside. *Commonwealth v. Cullen, supra; United States ex rel Taylor v. Rundle, supra; Lollar v. United States, supra.* One cannot presume from a silent record that a plea of guilty was voluntary. *Boykin v. Alabama, supra.* The inquiry made by Judge Johnson was not adequate to give flesh to the requirements of voluntariness, *McCarthy v. United States, supra; People v. Seaton, supra;* nor did it establish sufficient

facts to prove that the plea of guilty was at least a voluntary choice of the alternatives available, *North Carolina v. Alford, supra.* Therefore the court erred in denying petitioner's claim that as a matter of law judgment should enter setting aside his plea of guilty and granting his petition for writ of habeas corpus.

V

THE COURT ERRED IN DENYING THE PETITION FOR HABEAS CORPUS SINCE AN ACTUAL CONFLICT OF INTEREST, APPARENT ON THE FACE OF THE RECORD, RENDERED PETITIONER'S GUILTY PLEA INVOLUNTARY

In its statement of the facts the Connecticut Supreme Court notes that during his remarks on behalf of the Baker and Sejerman girls, Mr. Zaccagnino told the court that these girls had come under the influence of Charles Dukes who had let them astray. It was found that he pointed out that because of their cooperation with the State Police they capitulated the petitioner into pleading guilty. Further he placed the blame for the offenses committed by the girls on Dukes saying that he was the most culpable since he had all the instruments with which to dupe the girls.

In the final analysis this recitation of the facts is the most important aspect of the entire case and points to the fundamental error of the court in denying the petition for habeas corpus. It clearly spells out conduct on the part of Attorney Zaccagnino which is in conflict with the interests of the petitioner. This is conduct which the court found to have happened in fact. Yet in spite of this finding the lower court's decision dismissing the petition for habeas corpus is affirmed.

If this case turned on nice legal questions involving potential conflicts of interest or the possible prejudice of joint representation, then, the court might have found some basis for denying the petition. But we are dealing with a situation wherein an attorney appeared on behalf of an accused

before the very judge, who some two weeks later was to sentence his client, and excoriated him for the involvement of two other accused. This tactic on behalf of the Baker and Sejerman girls might be justified if they were the only two being represented by Attorney Zaccagnino. But when the party who is the victim of these accusations is his own client it is inexcusable. While the petitioner might have known (assuming he were sophisticated enough to recognize it) of a potential conflict of interest, he certainly could not have known that his attorney would turn on him in the fashion he did. Faced with an actual conflict of interest, the trial judge on June 16, 1967, when the petitioner appeared for sentencing, had a duty to advise him of the remarks made to him some two weeks earlier. This duty was especially apparent in view of the petitioner's own request to set aside the guilty plea. The court on review should have set aside the pleas as well.

CONCLUSION

The essence of our adversary system of jurisprudence envisions a testing of issues wherein the combatants are both represented by competent counsel who fight vigorously and to the fullest for their clients' interests. If one of the parties to the action is represented by an attorney who does not have his sole and exclusive interests at heart then the system fails. The strength of our system is what is ultimately in question here. Petitioner contends that a conflict of interest on the part of his attorney has been shown. For him a vital part of the adversary system was not present. Therefore the guilty plea entered by him cannot be claimed to be the product of his free and unconstrained will. It must be set aside.

For all of the foregoing reasons, the judgment of the court below should be--and petitioner requests that it be--reversed, the plea of guilty should be set aside and the matter remanded to the trial court.

Respectfully submitted,

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Counsel for Petitioner

December 24, 1971

IN THE

Supreme Court of the United States

TERM, 1971

No. 71-5172

CHARLES O. DUKES,

Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,

Respondent.

BRIEF FOR THE RESPONDENT

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To be argued by:
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OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported, *sub nomine, Charles O. Dukes* v. *Warden, Connecticut State Prison,* Conn. , A.2d , (33 Connecticut Law Journal No. 2, p. 14, July 13, 1971). (App. p. 48, et seq.)

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on June 25, 1971, which judgment was announced on July 13, 1971, wherein it affirmed the decision of the Superior Court for Hartford County denying Charles O. Dukes' petition for habeas corpus. The petition for a writ of certiorari was filed on July 27, 1971, and was granted on November 9, 1971. The jurisdiction of this court is invoked under the authority of 28 U.S.C.A. § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner maintains that the judgment of the Connecticut Supreme Court affirming the denial of his petition for a writ of habeas corpus violates his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED

Was there a conflict of interest prejudicial to the petitioner when he retained counsel to represent him in a narcotics-larceny-receiving case who he knew already represented two girls in a separate and unrelated case, and when he knew the girls had cooperated with the police against him in the unrelated case?

When petitioner alleges in a habeas corpus proceeding two years after his guilty plea that his counsel had a conflict of interest, must the petitioner prove that there was an actual conflict, that the petitioner was prejudiced thereby and that the conflict rendered the plea involuntary?

(Joint Appendix references are prefaced by "App. p. ."
Respondent's Appendix references are prefaced by "Resp. App. p. A ."
All statutory references are to Connecticut General Statutes.)

STATEMENT OF THE CASE

The respondent adopts the petitioner's statement of the case with the following additions:

When the petitioner hired Attorney Zaccagnino to represent him in the narcotics and larceny-receiving case, the petitioner knew that Mr. Zaccagnino was already representing Sandra Baker and Andrea Sejerman, his accomplices in the conspiracy-false pretenses case. (App. pp. 44, par. 42, 116).

The sentencing remarks by Attorney Zaccagnino in the Sandra Baker and Andrea Sejerman cases, referring to Dukes, only had to do with the relationship between Dukes and the two girls in that particular case where all three were co-accused. The remarks were not connected with the narcotics and larceny-receiving case. (App. pp. 44, par. 40, 123). Mr. Zaccagnino's remarks about Dukes were a repetition of what had already been told the court by the State's Attorney. These facts were also before the court in great detail in the girls' presentence reports. (App. p. 57). The girls had cooperated with the police against petitioner long before Mr. Zaccagnino was hired to represent them and before he was hired by petitioner. (App. pp. 70, 128).

The petitioner knew the nature of the charges against him because he was present at a preliminary bind-over hearing when there was testimony taken. (App. pp. 13, 130). He knew the contents of the search warrant and return which had been the subject of a motion to suppress. (App. p. 12). The factual basis for the plea was before the court which accepted the plea in the search warrant itself. (App. p. 12, Resp.

App. pp. A5-12 6-13). The sentencing court had the factual basis before it in the probation report. (App. pp. 33, 57).

The petitioner did not at any time make any complaint to the trial court that he was not satisfied with Attorney Zaccagnino because he represented Sandra Baker and Andrea Sejerman in the unrelated case. (App. pp. 44, par. 45, 136).

The petitioner's guilty plea was entered after plea-bargaining conferences. (App. pp. 39, par. 8, 120, 123, 131, 132). The petitioner received the sentence that he bargained for. (App. pp. 57, 131). He was experienced in criminal matters and in court appearances to answer to criminal charges. *State* v. *Dukes,* 157 Conn. 498, 505, 255 A.2d 614. The petitioner had several other felony charges pending against him at the time. (App. pp. 120, 131). He had been informed against as a second offender. G.S. 54-118 (Resp. App. p. A4 5).

When the petitioner requested that offenses against him in other counties be consolidated for disposition with his Hartford County case, he knew that he would be required to plead guilty to all the offenses that were consolidated. G.S. 54-17a (Resp. App. p. A3 4, App. p. 125).

SUMMARY OF ARGUMENT

In a collateral attack on a guilty plea, a claim of ineffective assistance of counsel based on an alleged conflict of interest is a factor to be considered in determining whether such plea was voluntary and intelligent. But for a guilty plea to be overturned on this ground it must be shown by petitioner that there was indeed a conflict and that counsel's conduct was so interrelated with the plea that it made the plea involuntary and unintelligent. There is nothing in the record to indicate or prove this relationship.

The petitioner's guilty plea was entered after plea bargaining for a favorable recommended sentence, and he received the sentence he bargained for.

The trial court made adequate on-the-record inquiry to determine that the plea was voluntary and knowing. There was a factual basis for the plea before the court which acted on a motion addressed to the search warrant and afterwards took the plea. The factual basis for the plea was set forth in the probation report which was before the sentencing court.

ARGUMENT

I

THE VALIDITY OF A GUILTY PLEA CANNOT BE COLLATERALLY ATTACKED BY AN UNPROVEN ASSERTION OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON ALLEGED CONFLICT OF INTEREST WITHOUT A SHOWING BY THE PETITIONER OF AN ACTUAL CONFLICT PREJUDICIAL TO HIM.

This is a collateral attack on a conviction resulting from a bargained plea of guilty to two of many offenses. The attack comes some two years after the conviction, after petitioner had appealed his conviction to the Connecticut Supreme Court, *State* v. *Dukes,* supra, and after he had petitioned for habeas corpus in the United States District Court. U. S. District Court, District of Conn., Civil Action No. 13029.

In neither his direct appeal nor his federal petition for habeas corpus did petitioner claim that his counsel represented conflicting interests so as to render his guilty plea involuntary. Bringing this habeas corpus on this ground was an afterthought.

The petitioner chose to take the benefits of a bargained plea of guilty and then to pursue his conflict claim in a collateral proceeding. See *McMann* v. *Richardson,* 397 U.S. 759 (1970).

As the Connecticut Supreme Court pointed out in its opinion below:

> ". . . an allegation of the ineffective assistance of counsel is a factor to be taken into consideration in determining whether a guilty plea was voluntary and intelligent,

but for the plea and the judgment of conviction based thereon to be overturned on this ground, it must be demonstrated that there was such an interrelationship between the ineffective assistance of counsel and the plea, that it can be said the plea was not voluntary and intelligent because of the ineffective assistance. See *Parker* v. *North Carolina,* 397 U.S. 790, 796, 90 S. Ct. 1458, 25 L. Ed. 2d 785; *McMann* v. *Richardson,* 397 U.S. 759, 770, 90 S. Ct. 1441, 25 L. Ed. 2d 763; *United States ex rel. Boucher* v. *Reincke,* supra, 981." (App. p. 54).

Even if there was a conflict of interest, the judgment of conviction based on petitioner's guilty plea must stand unless the conflict rendered the plea involuntary and unintelligent. As it will be pointed out, infra, such a nexus between the alleged conflict of interest and the plea has not been established; to the contrary, there was no conflict and the plea was entirely voluntary and intelligent.

A. The petitioner was not denied the effective assistance of counsel by virtue of his counsel's representation of co-accused in another unrelated case. Petitioner has not established that there was a conflict of interest between his counsel's representation of him in the case at issue and his representation of co-accused in another unrelated case. In *Glasser* v. *United States,* 315 U.S. 60, (1942) the Supreme Court enunciated the principle that a conflict of interest in the representation of two or more defendants in the *same case* constitutes denial of effective assistance of counsel. The mere fact, however, of joint representation of co-defendants by a single attorney is not sufficient to establish ineffective assistance of counsel in the absence of a showing of actual conflict of interest prejudicial to one of the defendants. Undoubtedly it would have been a conflict of interest for the same lawyer to have represented the petitioner and the two girls in a case in which all three were charged as defend-

ants, at least if they had divergent interests and defenses. Here, however, we are not dealing with representation of co-defendants in the same case. Rather this is a case in which petitioner retained as his counsel a lawyer who he knew was already representing two persons jointly accused with petitioner in an unrelated case. Under these circumstances there was no apparent conflict either in the event of a trial or in the event of a guilty plea.

In a case in which petitioner selected and retained his own lawyer, the court in taking a plea must be able to rely on the fact that petitioner had made his own choice and that petitioner believed, for whatever reasons he may have had, that he was acting in his own best interests. When petitioner chose to plead guilty, the court properly inquired as to voluntariness of the plea and whether petitioner was satisfied with counsel. The court ought to be able to rely upon what petitioner said in response to its questions. There was not the slightest hint to the court that the fact of petitioner's counsel representing the two girls in some unrelated case had anything to do with his decision to plead guilty.

Petitioner himself did not make that claim in his testimony in his habeas corpus trial. He said that Attorney Zaccagnino tried to persuade him to plead guilty. (App. p. 152). He said that Attorney Delaney appeared with him at the time of his change of plea, that he was surprised, and that Mr. Delaney advised him to plead guilty temporarily in order to gain time. (App. pp. 148, 149). He said that he told the probation officer he was undecided about withdrawing his guilty plea. (App. p. 154). He said that he first told Attorney Zaccagnino that he wanted to withdraw his guilty plea on June 16, the day he was sentenced. (App. pp. 156, 157). He said all of those things, but he did not say that counsel represented interests divergent from his own.

The two girls did not appear for sentencing until June 2, over two weeks after Dukes changed his plea. When Attorney Zaccagnino appeared for the two girls at their sentencing, he did what any other lawyer representing them would have done. The court knew from the probation reports and from the remarks of the prosecution that they had been associated with Dukes. (App. p. 63). That was true. Counsel did blame Dukes in an attempt to secure favorable treatment for the girls. If that had any effect, it was to help the girls and not to prejudice petitioner. Petitioner was not before the court at that time and never did appear before the court in the case where he was charged with the girls.

There has been no showing that the petitioner's guilty plea resulted from the alleged conflict of interest. Petitioner does not claim, the record does not in any way disclose, and it cannot be inferred from the record, that either Attorney Zaccagnino or Attorney Delaney induced the petitioner to plead guilty in furtherance of a plan to obtain more favorable consideration from the court for the girls. The girls had already cooperated with the police before Attorney Zaccagnino ever represented them and they had pleaded guilty before petitioner appeared in Superior Court for plea. Neither is it claimed, nor does the record indicate, that the petitioner received any misleading advice from Attorney Zaccagnino or Attorney Delaney which led him to plead guilty.

See *McMann* v. *Richardson,* supra;
Parker v. *North Carolina,* 397 U.S. 790 (1970)

The guilty plea was the voluntary and intelligent act of the petitioner not motivated by any conflict of interest. The guilty plea was a waiver of constitutional rights — a waiver

of nonjurisdictional defenses — and was a valid plea of guilty.

> *Brady* v. *United States,* 397 U.S. 742, 748 (1970); *United States ex rel. Rogers* v. *Warden,* 381 F.2d 209, 212 (2d Cir. 1967)

Petitioner has pointed out that during court proceedings on May 9, when the case was assigned for trial, Attorney Zaccagnino moved to withdraw due to a "slight conflict." Upon examination, however, it is evident that this conflict was the result of Attorney Zaccagnino's efforts to negotiate a favorable disposition of the case, and that the petitioner's plea was not rendered involuntary or unintelligent because of the existence of this so-called "slight conflict." The fact of the matter is that there was a disagreement between the petitioner and Attorney Zaccagnino at the time in question because the petitioner was unwilling to follow Attorney Zaccagnino's recommendation that he plead guilty. The "slight conflict" referred to by Mr. Zaccagnino had nothing at all to do with his representation of the two girls in the other unrelated case. (App. pp. 112, 114, 116, 120). The petitioner contends that when Attorney Zaccagnino moved to withdraw, the court should have inquired into the situation and allowed the petitioner to proceed with other counsel of his own choosing. Discussions between the petitioner and Attorney Zaccagnino concerning the advisability of pleading guilty were in the nature of a privileged matter between attorney and client. This difference of opinion was later resolved and had nothing whatsoever to do with the conflict of interest now claimed to have affected the plea.

B. There must be some prejudice resulting from a conflict of interest before one can be said to have been denied effective assistance of counsel. It is unclear what

constitutes sufficient prejudice. While some courts require a strong showing of prejudice, see e.g., *Lott* v. *United States,* 218 F.2d 675 (5th Cir. 1955); *United States* v. *Burkeen,* 355 F.2d 241 (6th Cir. 1966), cert. den. sub. nom. *Matlock* v. *United States,* 384 U.S. 957 (1966); *Lugo* v. *United States,* 350 F.2d 858 (9th Cir. 1965), other courts have taken the position that a showing of only the possibility of prejudice is sufficient. *Lollar* v. *United States,* 376 F.2d 243 (D.C. Cir. 1967).

Where cases concerning defendants with conflicting interests or inconsistent defenses have been tried together, it has sometimes been said that the possibility that harm might result from the fact that the defendants are represented by the same lawyer is sufficient to show prejudice. The question arises in a context like that found in *Lollcr* v. *United States,* supra. Where one lawyer represents co-defendants in a trial and the possibility exists that he may have to make decisions in the course of the trial inimical to the interests of one defendant in order to benefit the other, the possibility of prejudice is apparent. It does not logically follow that such should be the result where the defendants are charged in unrelated cases with different offenses, plead guilty and are sentenced at different times.

There has not been any showing of prejudice. The alleged conflict must be inferred from the fact that Attorney Zaccagnino made remarks about the petitioner to the sentencing trial judge before whom he was appearing on behalf of the two girls in the unrelated case in an effort to secure lighter sentences for them. The petitioner takes the position that he was prejudiced by these remarks because they were made before the judge who, two weeks later, sentenced him for the offenses to which he pleaded guilty in the case at

issue here. The petitioner was not prejudiced by these remarks because he had already made his plea bargain.

When petitioner appeared for sentencing on June 16, the cases in which the girls were charged and sentenced were not mentioned. (App. p. 28). There is nothing at all to suggest that the court connected the cases in any way or even remembered what had been said in the unrelated cases involving the girls. Whatever the effect was from what was said in the girls' case, it would not have been lessened if separate counsel appeared for the girls because separate counsel would have said the same things. The court was not influenced by what was said because the petitioner received the sentence he bargained for. He could not have received any lesser minimum sentence since he received only the mandatory statutory minimum. G.S. 19-265 (Resp. App. pp. A2, A3)

In *Brady* v. *United States*, supra, this court stated:

> "We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged."
>
> *Brady* v. *United States*, supra 751

The petitioner pleaded guilty in exchange for a promise by the prosecutor to recommend a certain sentence to the court lighter than that which he might have received — not because of the alleged conflict of interest.

II.

THE GUILTY PLEA BY THE COURT-EXPERIENCED PETITIONER WAS THE RESULT OF OVERWHELMING STATE EVIDENCE, EXPOSURE AS A SECOND OFFENDER, SEVERAL OTHER FELONY CHARGES PENDING AGAINST HIM, AND PLEA BARGAINING FOR A FAVORABLE RECOMMENDED SENTENCE WHICH HE RECEIVED.

The petitioner's arrest came about as a result of the seizure of narcotics in a dwelling occupied by him. The narcotics were seized in the course of the execution of a valid search warrant. Stolen goods on the premises were also seized in the execution of this warrant. (Resp. App. pp. A5-12). In connection with court proceedings on May 9, petitioner's counsel had filed a motion for a bill of particulars asking the State to disclose whether or not the State intended to offer proof of a sale of narcotics. The State furnished the petitioner the date, time and place of the narcotics sale by petitioner, which was made shortly before the warrant was executed and from the same premises. (App. pp. 15, 16, 22). In order to violate the narcotics statute under which the petitioner was charged, it was not necessary to prove the sale. The possession of the narcotics found in the execution of the search warrant would have been sufficient to constitute a violation of the statute. G.S. 19-246 (Resp. App. p. A8).

Petitioner and his counsel were aware of the evidence against him. Petitioner had heard the evidence against him at a bindover hearing. He knew the contents of the search warrant. He was aware that a motion to suppress the evidence seized pursuant to the search warrant had been denied.

In addition to the two cases in which guilty pleas were entered, petitioner had several other felony charges pending against him. Some of these charges were pending in Hartford

County and others were pending outside the County. Under the applicable statutes, petitioner could request that the outside cases be consolidated in Hartford County for disposition. This was requested by petitioner and the consolidation was agreed to by the State's Attorneys concerned. G.S. 54-17a (Resp. App. p. A4)

The Connecticut statutes provided that one who had been convicted and sentenced before to a state prison or reformatory was subject to a maximum sentence twice that which might have been imposed on one who had not been so imprisoned. Petitioner had been charged as a second offender under the relevant statute and was subject to such an increased penalty. G.S. 54-118 (Resp. App. p. A5)

It was in light of this state of affairs that the petitioner decided to plead guilty in exchange for a promise by the prosecutor to recommend a certain sentence to the court. It is not surprising under the circumstances recited above that the petitioner concluded that it would be in his own best interest to negotiate a plea for the best possible sentence recommendation, which the court adopted. (App. pp. 57, 131).

III.

PETITIONER'S GUILTY PLEA WAS VOLUNTARY AND INTELLIGENT, MADE AFTER ADEQUATE ON-THE-RECORD INQUIRY, RATIFIED BY HIS CONDUCT AND AFFIRMED ON DIRECT APPEAL.

Once the petitioner requested the court to change his plea to guilty and the court accepted the guilty plea, the petitioner performed certain acts that corroborated and ratified the voluntariness of his plea. He agreed to an amendment to the information being filed adding the larceny-receiving count to the charges against him and elected to plead guilty to that amendment. G.S. 53-63, 53-65 (Resp. App. p. A3).

The case was continued to June 2 for sentencing and a probation report was ordered. The petitioner conferred with the probation officer who was preparing the probation report and did not tell the probation officer that his guilty plea was involuntary or that he wished to withdraw that plea. He requested the State to consolidate in Hartford County all the other charges pending against him in other counties. In order to consolidate charges from other counties into Hartford County, the statute required that the petitioner making such a request agree to plead guilty to all of the consolidated charges. G.S. 54-17a (Resp. App. p. A8).

The petitioner appeared in court on June 2 with his counsel, Mr. Zaccagnino, the day originally assigned for sentencing. On that date, the case was continued to June 16 for sentencing because the probation report had not been prepared and the cases to be consolidated from other counties had not at that time been received in Hartford County. In connection with this court appearance he did not make any representation to the court either that he was dissatisfied with his counsel or that he wished to withdraw his guilty plea. (App. p. 27).

From May 16 to June 16, the petitioner did not indicate in any way that his plea was involuntary. On June 16 when he asked for a continuance, for the first time he told the court that he wished to withdraw it, but he did not say anything about ineffective assistance of counsel due to a conflict of interest. As heretofore mentioned, he did not make this claim in connection with his appeal, and he did not make this claim in his petition for a federal writ of habeas corpus which he had filed before the present state habeas corpus.

The plea of guilty was entered not only in the light of all of the factual circumstances herein related but also only after sufficient inquiry by the court to determine that the plea was voluntary and intelligent. The petitioner claims that

the court's inquiry did not satisfy the requirements of *Boykin* v. *Alabama,* 395 U.S. 238 (1969). Although the plea was pre-*Boykin,* the *Boykin* requirements were essentially satisfied. In relation to the *Boykin* standard, the petitioner was questioned by the trial court about his satisfaction with his counsel, about his understanding that the State had the burden of proof, that he was entitled to a trial, and about the probable consequences of his plea. He was asked directly whether he was induced to plead guilty by anyone and whether his plea was of his own free will. His answers to all of these questions clearly showed that his plea was intelligent and voluntary. The court also had before it at this time the factual circumstances in connection with the case because the court had already examined and passed upon the validity of the search warrant in a motion to suppress. (App. pp. 12, 13). The court also knew that the State was prepared to prove, in addition to the circumstances set forth in the search warrant, a sale of narcotics by the petitioner.

Boykin requires that the court make sure that the accused has a full understanding of what the plea connotes and of its consequence. The court need not explain to the defendant the nature of the charge so long as there is a basis in fact for the court to accept the plea of guilty. With the factual situation before the trial court and with the court's knowledge of the maneuvering by the petitioner and the petitioner's counsel to avoid going to trial, and with the overwhelming evidence against petitioner, there can be no doubt that the trial court was satisfied that the plea was voluntary and knowing and that it was a rational decision.

Although *Boykin* has been adequately and substantially complied with in this pre-*Boykin* plea, it has been held that the *Boykin* rule should not be applied retroactively. *Consiglio* v. *Warden,* 160 Conn. 151, 276 A.2d 773; *Green* v. *Turner,* 443 F.2d 832 (10th Cir. 1971); *Commonwealth* v. *Godfrey,* 434 Pa. 532, 254 A.2d 923; *United States ex rel. Grays* v.

Rundle, 428 F.2d 1401 (3rd Cir. 1970). The same rationale as to retroactive application of the *Boykin* rule should apply as in the retroactive application of the *McCarthy* rule, only more so. *McCarthy* v. *United States,* 394 U.S. 459 (1969); *Halliday* v. *United States,* 394 U.S. 831, 833 (1969).

Finally, on direct appeal, the court found that petitioner's plea of guilty on May 16 was voluntary and intelligent; that he had ample time between May 16 and June 16 to indicate a desire to withdraw his guilty plea or to change counsel; that no credible evidence was introduced in support of his request to change his plea; and that his request to change his plea of June 16 at the time of sentencing was for the purpose of delaying sentencing.

State v. *Dukes,* supra, 506

A plea is voluntary when it is not induced by promises or threats which deprive it of the character of a voluntary act. It is intelligent when the defendant understands the meaning of the charge, what acts constitute guilt, and the consequences of his plea. Petitioner's plea was accepted only after judicial inquiry. The guilty plea is the most reliable and persuasive proof of guilt, and in this case it was clearly in petitioner's best interests.

CONCLUSION

The petitioner, experienced in criminal matters and in court appearances to answer criminal charges, launched this collateral attack on his conviction more than two years after his voluntary plea of guilty. He failed to assert this claim in a direct appeal and in a prior federal habeas corpus petition. He never raised the issue before the trial court. The court and the prosecutor could not have done anything to protect the record against such an attack. This amounts to ambuscade of the trial court.

The late complaint of the petitioner about his counsel's conduct should not operate to turn loose the obviously guilty petitioner.

The integrity of the proceedings should not be thus impugned in the absence of an unmistakable showing of an actual conflict of interest prejudicial to the petitioner.

The judgment of the Supreme Court of Connecticut ought to be affirmed.

Respectfully submitted,

Respondent

By JOHN D. LABELLE
State's Attorney

GEORGE D. STOUGHTON
Chief Assistant
State's Attorney

IN THE

Supreme Court of the United States

TERM, 1971

No. 71-5172

CHARLES O. DUKES,

Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF

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General Statutes of Connecticut
1965 SUPPLEMENT

Sec. 53-63. *Larceny. Shoplifting.* (a) Any person who steals any money, goods or chattels, or any bill issued by any state bank or national banking association, or any deed, lease, indenture, bond, writing obligatory, bill of exchange, promissory note, warrant or order for the payment of money or delivery of goods, receipt or discharge, or any book account or other writing being evidence of debt, adjustment or settlement, if the value of the property stolen exceeds two thousand dollars, shall be imprisoned not more than twenty years or fined not more than one thousand dollars or both; if it exceeds two hundred fifty dollars but does not exceed two thousand dollars, he shall be imprisoned not more than five years or fined not more than five hundred dollars or both; if it does not exceed two hundred fifty dollars but exceeds fifteen dollars, he shall be fined not more than two hundred dollars or imprisoned not more than six months or both; if it does not exceed fifteen dollars, he shall be fined not more than twenty-five dollars or imprisoned not more than thirty days or both. . . . .

General Statutes of Connecticut
REVISION OF 1958

Sec. 53-65. *Receiving stolen goods.* Any person who receives and conceals any stolen goods or articles, knowing them to be stolen, shall be prosecuted and punished as a principal, although the person who committed the theft is not convicted thereof.

General Statues of Connecticut
1965 SUPPLEMENT

UNIFORM STATE NARCOTIC DRUG ACT

Sec. 19-265. *Penalty for illegal possession or dispensing.* Any person who violates any provision of this chapter,

other than by administering to himself or by being addicted to the use of narcotic drugs, for the first offense, shall be fined not less than five hundred dollars nor more than three thousand dollars and imprisoned not less than five years nor more than ten years, or be both fined and imprisoned; and for a second offense, shall be fined not less than two thousand dollars nor more than five thousand dollars or imprisoned in the State Prison not less than ten nor more than fifteen years, or be both fined and imprisoned; and for any subsequent offense shall be imprisoned in the State Prison not less than fifteen nor more than twenty-five years.

General Statutes of Connecticut
1965 SUPPLEMENT

UNIFORM STATE NARCOTIC DRUG ACT

Sec. 19-246. *Acts prohibited.* No person shall manufacture, possess, have under his control, sell, prescribe, dispense, compound, administer to himself or to another person or be addicted to the use of any narcotic drug, except as authorized in this chapter.

General Statutes of Connecticut
REVISION OF 1958

Sec. 54-17a. *Presentation in one county for offenses charged in various counties where defendant to plead guilty.* When any person is arrested in any county upon a criminal charge within the jurisdiction of the superior court and any indictment or information is pending against him in the superior court for one or more other counties, he may, with his consent and that of the state's attorney for each such county, be presented in the county where the first warrant served upon him originated for all of the offenses to which he intends to plead guilty.

General Statutes of Connecticut
REVISION OF 1958

Sec. 54-118. *Punishment upon second and third conviction.* Any person having been convicted of any crime and imprisoned therefor in the State Prison or state reformatory in this state or in any state prison or penitentiary for a term less than life, who afterwards is convicted of any crime for which the imprisonment may be a term in the State Prison, may be imprisoned therein for a term not exceeding double the term provided by law for such offense; and any person who has been twice convicted of the crime of theft, not punishable by imprisonment in such prison, and afterwards commits the same crime, may be imprisoned therein not more than three years.

SECOND OFFENDER INFORMATION

No. 28358, Superior Court

Hartford County, May Term, 1967

And the said Attorney further presents and informs that the said Charles O. Dukes was once before convicted, sentenced and imprisoned in the State Prison at Wethersfield, Connecticut, to wit:

On or about the 10th day of February, 1961, at the Superior Court holden in and for the County of Hartford, the said Charles O. Dukes was duly convicted of Breaking and Entering with Criminal Intent and Assault — and was sentenced to be confined in the State Prison at Wethersfield, Connecticut, for a term of not less than two nor more than five years, and was thereafter duly imprisoned under said sentence; in violation of Section 54-118 of the Connecticut General Statutes, Revision of 1958.

s/ John D. LaBelle
State's Attorney

STATE OF CONNECTICUT

CIRCUIT COURT

AFFIDAVIT AND APPLICATION
SEARCH AND SEIZURE WARRANT

TO: A Judge of the Circuit Court

The undersigned, being duly sworn, complains on oath that the undersigned has probable cause to believe that certain property, to wit: Narcotics, cookers, white powder, wires, scotch tape, syringes, eyedroppers, hypodermic needles, cotton, glassine bags, tinfoil, marihuana, brown paper, tissue paper, amphetamines, barbiturates and other addiction paraphernalia is possessed, controlled, designed or intended for use as a means of committing the crime of Section 19-246, Violation State Narcotic Drug Act and Section 19-227, Illegal Possession Drugs; is or has been or may be used as the means of committing the crime of Section 19-246, State Narcotic Drug Act and Section 19-227, Illegal Possession of Dangerous Drugs.

And is within or upon a certain person, place, or thing, to wit: 15 Barbour Street, Hartford, Connecticut, a one-family house occupied by Charles Dukes, Lucy Demirgian and Rubin Fletcher and on the person of said Charles Dukes, Lucy Demirgian and Rubin Fletcher and a 1965 Cadillac white convertible bearing license BZ 7154, a 1959 Plymouth black hard top bearing license AY 1641 and a blue Chevrolet Corvair bearing license 990-767, all Connecticut registration.

And that the facts establishing the grounds for issuing a Search and Seizure Warrant are the following:

1. The undersigned, Sgt. Ralph Frank and Det. Madison Bolden, experienced vice squad officers, and have been so assigned for the past five years.

2. The undersigned have maintained a surveillance for the past several weeks on 15 Barbour Street, Hartford, Connecticut. On many occasions, Charles Dukes, Lucy Demirgian and Rubin Fletcher would be seen by the undersigned operating the above-mentioned cars, Connecticut BZ 7154, AY 1641, and 990-767. Most of these instances the operators would be in the company of known drug users and these said vehicles would be coming to and from this address.

3. Checked with Motor Vehicle Department: Revealed Conn. BZ 7154, a 1965 white Cadillac convertible and AY 1641, a 1959 black Plymouth hard top are registered to Charles Dukes of 15 Cabot Street, Hartford, Connecticut. The 1965 Chevrolet, Conn. Registration 990-767 is registered to Hatfik Demirgian of 10 Imlay Street, East Hartford, Connecticut. These are the cars that have been operated by the above-mentioned subjects in which known drug users and addicts have been passengers.

4. Each of the undersigned have received information from the same confidential and reliable informant who has given information in the past leading to the arrest and conviction in other narcotic cases that on March 9, 10 and 11 of 1967, said informant has been in the house and observed Charles Dukes and Rubin Fletcher with a quantity of narcotics in their possession and Lucy Demirgian was present at the time. On March 13, 1967, said informant went to this location at about 3:30 p.m. and again witnessed Charles Dukes with a quantity of narcotics on his person.

Said informant is experienced and familiar with narcotics.

5. On March 13, 1967, between the hours of 3:00 and 4:00 p.m., the undersigned officers kept this location

under surveillance and personally observed known addicts enter and leave the house.

6. On March 12, 1967, after 1:00 a.m., the car of Charles Dukes, Conn. BZ 7154, was parked on Barbour Street alcng with several other cars. Many persons were seen to enter and leave these premises, 15 Barbour Street. Behind the front door was seen an unknown person admitting persons to the front porch.

7. During the past several weeks, numerous complaints have been received from neighbors in the area that known drug addicts are frequenting 15 Barbour Street and that Charles Dukes and others occupy this address. Also that said Charles Dukes has been seen driving to and from the house with known addicts in his white convertible Cadillac.

The undersigned has not presented this application in any other court or to any other judge.

Wherefore the undersigned prays that a warrant may issue commanding a proper officer to search said person or to enter into or upon said place or thing, search the same, and take into custody all such property.

SIGNED AT HARTFORD, CONNECTICUT, THIS 14th DAY OF MARCH, 1967.

s/ Madison Bolden, Detective
Affiant

s/ Sgt. Ralph J. Frank
Affiant

Jurat Subscribed and sworn to before me this 14th day of March, 1967.

s/ Daly, J.
Judge of the Circuit Court

SEARCH AND SEIZURE WARRANT

STATE OF CONNECTICUT

CIRCUIT COURT

The foregoing Affidavit and Application for Search and Seizure Warrant having been presented to and been considered by the undersigned, a Judge of the Circuit Court, the undersigned (a) is satisfied therefrom that grounds exist for said Application, and (b) finds that said Affidavit establishes grounds and probable cause for the undersigned to issue this Search and Seizure Warrant, such probable cause being the following: From said Affidavit, the undersigned finds that there is probable cause for the undersigned to believe that the property described in the foregoing Affidavit and Application is within or upon the person, if any, named or described in the foregoing Affidavit and Application, or the place or thing, if any, described in the foregoing Affidavit and Application, under the conditions and circumstances set forth in the foregoing Affidavit and Application, and that, therefore, a Search and Seizure Warrant should issue for said property, proof of affidavit having been made before me this day by Sgt. Ralph Frank and Det. Madison Bolden, two credible persons, that there is Probable Cause for believing that there are in the one family house on the premises of 15 Barbour Street, Hartford, Conn., on the persons of Charles Dukes, Lucy Demirgian, and Rueben Fletcher, in the 1965 White Cadilac Convertible bearing license BZ 7154, a 1959 Black Plymouth hardtop bearing license AY 1641, and a 1965 Chevrolet, Corvair, blue in color bearing license 990-767, all Connecticut registrations, narcotics and drugs are possessed, transported, sold and in some cases used in violation of Section 19-246, violation of the State Uniform Narcotic Drug Act and 19-227, Illegal Possesion of Dangerous Drugs, of the Connecticut General Statutes.

NOW THEREFORE, by Authority of the State of Connecticut, I hereby command any Police Officer of a regularly organized police department or any State Policeman to whom these presents shall come within a reasonable time after the date of this warrant to enter into or upon and search the place or thing described in the foregoing Affidavit and Application, to wit: A single family house, 15 Barbour Street, Hartford, Conn. and in a 1965 White Cadillac Convertible bearing Conn. Reg. BZ 7154, a 1959 Black Plymouth Hardtop bearing Conn. AY 1641 and a 1965 Blue Chevrolet Conn. 990-767, search the person described in the foregoing Affidavit and Application, to wit: The persons of Charles Dukes, Lucy Demirgian, and Rueben Fletcher, for the property described in the foregoing Affidavit and Application, to wit: Narcotics, cookers, white powder, wires, scotch tape, syringes, eye droppers, hypodermic needles, cotton, glassine bags, tinfoil, marijuana, brown paper, tissue paper and amphetamines, barbiturates, and other addiction paraphernalia, and upon finding said property to seize the same, take and keep it in custody until the further order of the court, and with reasonable promptness make due return of this warrant accompanied by a written inventory of all property seized.

Signed at Hartford, Connecticut, this 14 day of March, 1967.

Signed (A Judge of the Circuit Court)

s/ Daly, J.

RETURN FOR AND INVENTORY PROPERTY SEIZED ON SEARCH AND SEIZURE WARRANT

Then and there by virtue of and pursuant to the authority of the foregoing warrant, I searched the person, place, or thing named therein to wit:

Person of Charles Dukes

Person of Lucy M. Demirgian

Single family dwelling known as 15 Barbour Street, Hartford, and found thereon or therein, seized, and now hold in custody, the following property:

1 cardboard box size 1½" X 1½" X 7" containing numerous glassine bags, inside of which were the following:

8 glassine bags containing white powder

1 small glass bottle containing white powder

1 small pill box labeled quinine sulphate containing 3 glassine bags

1 small white powder, 12 capsules, 10 of which contained white powder

2 rolls of scotch tape

1 "Cadillac" tank type vacuum cleaner — two tone green — all of above-mentioned items were found in the tank of this vacuum cleaner

52 glassine bags containing white powder found in brown paper bag under kitchen rug

1 small bottle label "Cocaine" containing white powder found under kitchen rug

3 glassine bags containing white powder — found on kitchen floor

1 glass eyedropper with black rubber bulb, small bottle cap, hyperdermic needle, small wad of cotton & copper wire, wrapped in kleenix in toilet

3 pink capsules — 3 blue capsules containing brown powder, wrapped in tinfoil — found in bedroom

1 jar of "McKesson" label milk sugar — containing white substance — found in cellar

1 yellow painted round can labeled "Borden's Beta Lactose" — containing white substance — found in cellar

$281 in U.S. currency taken from left hand of Charles Dukes

1 grey metal case telephone address pad

which was possessed, controlled, designed or intended for use as a means of committing the crime described in the foregoing affidavit and application or is or has been used as the means of committing the crime described in the foregoing affidavit and application, or was stolen or embezzled.

Date of this return 3/15/67

Signed,

Det. Madison Bolden

Det. Richard J. Hurley

Tpr. William Woodward

RETURN FOR AND INVENTORY
PROPERTY SEIZED ON SEARCH
AND SEIZURE WARRANT

Then and there by virtue of and pursuant to the authority of the foregoing warrant, I search the person, place or thing named therein to wit: Single family house at 15 Barbour Street, Hartford and found thereon or therein, seized and now hold in custody, the following property:

1 - Underwood Typewriter — col grey — large type ser nbr #13-9199810

1 - Royal office 440 typewriter col grey — ser #118526245 — New and in original carton

1 - 17" G.E. portable television set — color black, with identification of "Hartford Hotel" in red paint on bottom side. ser #385513

1 - Evette Schaeffer saxaphone — gold color — ser nbr #9320

3 pc. Samsonite Luggage — with name and address of owner "Laurendeau — 40 Orchid St., Bristol" on same

3 cardboard cartons with black crayon marking of "R y's X (Ray's Pharmacy) on same, cartons containing following liquor: 4 qts of Smirnoff Vodka, 2 qts of Milshire gin, 1 fifth Johnny Walker Red Label, 11 half pints of J & B scotch, 12 half pints of Cuddysark, 4 fifth of Cuddysark, 1 Qt of Gordon's Gin, 1 fifth of DeKuyper creme decoca, 1 fifth of Smirnoff gin, 2 fifths of Teacher's Highland, 1 fifth Seagrams VO

1 - dice table

which was possessed, controlled, designed, or intended for use as a means of committing the crime described in the foregoing affidavit and application, or is or has been used as the means of committing the crime described in the foregoing affidavit and application, or *was stolen* or embezzled.

Date of	signed	
this return	Thomas Barber	Edward J. Sheren
March 15th/1967	Sgt. Thomas Barber	Det. Edward Sheren

IN THE

Supreme Court of the United States

No. 71-5172

CHARLES O. DUKES,
Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONER

JAMES A. WADE
799 Main Street
Hartford, Connecticut 06103
Counsel for Petitioner

Washington D C THIEL PRESS 202 393-0625

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IN THE

Supreme Court of the United States

No. 71-5172

CHARLES O. DUKES,
Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONER

QUESTION PRESENTED

When an actual conflict of interest on the part of his attorney is apparent on the face of the record, does the petitioner have the burden of proving the quantum of prejudice he suffered as a result thereof?

ARGUMENT

THE ACTUAL CONFLICT OF INTEREST ON THE PART OF PETITIONER'S ATTORNEY, APPARENT ON THE FACE OF THE RECORD, CONSTITUTES A SUFFICIENT SHOWING OF PREJUDICE TO WARRANT SETTING ASIDE PETITIONER'S PLEA OF GUILTY SINCE HIS REPRESENTATION OF PETITIONER WAS NOT AS EFFECTIVE AS IT MIGHT OTHERWISE HAVE BEEN.

The thrust of respondent's argument throughout his brief is that the petitioner's plea of guilty should stand because he failed to show that he was prejudiced by the remarks made about him by his counsel. Stated another way, this argument seems to be that it does not matter what petitioner's attorney said about him, if he cannot show that these remarks hurt him, he cannot be heard to complain about them. Petitioner respectfully contends that the clear trend in the law is to guarantee that an accused has the undivided loyalty and service of his attorney and that it is up to the trial judges "to strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann v. Richardson,* 397 U.S. 759 (1970).

The touchstone against which virtually all conflict of interest decisions have been measured is that enunciated by this court in *Glasser v. United States*, 315 U.S. 60, 75-76 (1942), when the court said:

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.* (Emphasis added.)

The respondent contends that what constitutes "sufficient prejudice" to amount to a conflict of interest is unclear. He indicates that some courts have required a "strong showing"

of prejudice relying on *Lott v. United States*, 218 F.2d 675 (5th Cir. 1955); *United States v. Burkeen*, 355 F.2d 241 (6th Cir. 1966), cert. den. sub. nom. *Matlock v. United States*, 384 U.S. 957 (1966); *Lugo v. United States*, 350 F.2d 585 (9th Cir. 1965). (Respondent's Brief, p. 11.) However, since these cases were decided, the courts have in the main looked to see whether the representation of counsel might have been more effective but for the conflict of interest and let it go at that.

In *United States v. Gougis*, 374 F.2d 758, 761 (7th Cir. 1967) the defendant and a co-defendant, one Philips, were both represented by the same court-appointed attorney. Some of the most damaging testimony against the defendant came from Philips. The Seventh Circuit Court of Appeals found that a conflict of interest existed and used as a guideline the rule from *Glasser, supra*, 315 U.S. at p. 76, that the "representation . . . was not as effective as it might have been" if the conflict did not exist, saying:

> It seems clear, and we so hold that the representation of Gougis was not as effective as it might have been had his counsel not been required by the trial court to also represent Philips. Gougis was thus denied his right to the effective assistance of counsel guaranteed by the Sixth Amendment. This error alone requires that the verdict be set aside as to defendant Gougis and that he be given a new trial.

In *United States ex rel. Williamson v. LaVallee*, 282 F. Supp. 968, 973-74 (E.D. N.Y. 1968), the court specifically rejected the rule requiring a strong showing of prejudice and held that the defendant need show only that a genuine conflict of interest existed and not that some specific prejudice resulted therefrom, relying on *United States v. Gougis, supra*; and *Sawyer v. Brough*, 358 F.2d 70 (4th Cir. 1966).

Respondent argues that true conflict of interest cases arise in situations like those in *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967), "where one lawyer represents co-defendants in a trial and the possibility exists that he may

have to make decisions in the course of the trial inimical to the interests of one defendant in order to benefit the other" (Respondent's Brief, p. 11). However, the law is to the contrary. In *Whitaker v. Warden, Md. Penitentiary*, 362 F.2d 838 (4th Cir. 1966), the complainant was the defendant's own wife who accused him of committing statutory rape on her eleven-year-old daughter by another marriage. After he was arrested, Mrs. Whitaker informed her aunt, Mrs. McElfish, of what had happened. An attorney, Mr. Manges, was hired by Mrs. McElfish and he looked to her for his fee. The two women then told Manges they wanted the case disposed of as quickly, quietly and with as little notoriety as possible. Upon learning that Whitaker had signed a confession, Manges tendered a guilty plea on his behalf one week after his arrest, which plea was later changed to nolo contendere. Evidence was taken during the course of which Manges limited his examination to two questions. The Court of Appeals overturned the conviction on the ground that Manges was serving interests that conflicted with those of his client, saying:

> While the conclusion that counsel was not single-mindedly devoted to Whitaker's defense is based primarily upon representation afforded immediately after conviction, we think the conviction should be set aside. We cannot say that representation of Whitaker prior to his conviction was unaffected by the circumstances of counsel's employment and the admonitions of Mrs. Whitaker and Mrs. McElfish. *All that we need determine is that Manges was serving an interest or interests which conflicted with that of Whitaker; we need not delineate any specific prejudice to Whitaker flowing from his representation.* See *Glasser v. United States*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Sawyer v. Brough*, 358 F.2d 70 (4 Cir. 1966). [Emphasis added.]

And in *United States ex rel. Miller v. Myers*, 253 F. Supp. 55, 57 (E.D. Pa. 1966), the court granted a petition for habeas corpus because the attorney for the defendant, who was accused of burglary, had also represented the victim of

the alleged burglary in an unrelated civil matter. The court specifically noted that it did not ascribe to defendant's attorney anything but the highest of motives, but felt that the hazards resulting from a conflict of interest were so great as to warrant the issuance of the writ of habeas corpus saying:

> We are dealing here with the life of an individual who stood to be incarcerated for 20 years. His right to counsel under the Constitution is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no lawyer at all. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). This situation is too fraught with the danger of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation relator's rights whether or not it in fact influences the attorney or the outcome of the case.

In a thorough and well reasoned opinion the Court of Special Appeals of Maryland came to the same conclusion as the Court of Appeals for the Seventh Circuit in *United States v. Gougis, supra,* that the only prejudice that need be found is that the representation of counsel "was not as effective as it might have been . . ." *Glasser, supra,* 315 U.S. at p. 76. In *Brown v. State*, 10 Md. App. 215, 269 A.2d 96, 103 (1970), the court looked to the Maryland rule laid down in *Pressley v. State*, 220 Md. 558, 155 A.2d 494 (1959) that the conflict had to be actual or "imminently potential". It then harmonized the *Pressley* rule with that enunciated in *Glasser, supra,* as follows:

> "This Court feels the better position, in line with both *Pressley* and *Glasser*, is that there must be a showing of some prejudice but the prejudice need only be slight before relief is required. While *Pressley* requires a showing of prejudice. *Glasser* is written in terms too specific to require more than slight prejudice. Hence, the Supreme Court granted a new trial since the representation of Glasser "was not as effec-

> tive as it might have been * * * " Thus, this Court holds that once an actual or imminently potential conflict of interest is shown, the only demonstration of prejudice that is required is that counsel was not as effective as he might have been had the conflict not existed."

From all of the foregoing it is clear that the burden is not on the petitioner to prove the quantum of prejudice he suffered as a result of his attorney's conflict of interest. He need only show that the conflict of interest existed and that his counsel's representation therefore was not as effective as it otherwise might have been. In the present case petitioner has done both.

The conflict of interest on the part of his attorney is apparent on the face of the record in light of the remarks made at the time of sentencing. As the court noted in *Commonwealth v. Cullen*, 216 Pa. Super. 23, 260 A.2d 818, 820 (1970), such damaging remarks at the time of sentencing raise a "serious question with respect to [counsel's] representation on the plea itself." Was Mr. Zaccagnino's representation "as effective as it might otherwise have been?"

It must be remembered that throughout his representation, Attorney Zaccagnino or his partner had been urging the petitioner to plead guilty. Both at the time of plea and at the time of sentencing the petitioner attempted to obtain a continuance to hire a new lawyer. It should have been apparent to both Judge Johnson and Judge Devlin that the petitioner did not want to retain Mr. Zaccagnino as counsel.

Respondent argues that Attorney Zaccagnino's remarks were harmless since everything he said was already contained in the presentence report. (Respondent's Brief, pp. 3, 9.) That argument is specious. What did petitioner need a attorney for at all? Why not just hire the probation officer who did the presentence report? If anything, an accused, who finds himself confronted with matters in

aggravation which have been presented to the judge who is about to impose sentence by the presentence investigator, has all the more reason to need an attorney who will vigorously and credibly argue his cause. If nothing else Mr. Zaccagnino's credibility insofar as Judge Devlin was concerned must have been somewhat tarnished since he had only two weeks earlier laid the blame for the conduct of the Baker and Sejerman girls on this petitioner while arguing for leniency for the two girls before this very judge.

Respondent also makes much of the fact that petitioner received the sentence that he bargained for. (Respondent's Brief, pp. 4, 6, 12.) That argument presupposes that the "bargain" was binding upon the trial judge. Surely the respondent does not claim that to be the case. However, he does argue that the trial judge could not have given a lesser minimum sentence since he gave the mandatory statutory minimum under the law as it then existed. Conn. Gen. Stats. (Rev. 1958) § 19-265. But obviously the maximum term is of equal importance to the petitioner as the minimum term. After all the days in prison at the end of one's sentence are just as long as those at the beginning.

In the main, respondent's brief indulges in "nice calculations as to the amount of prejudice" that petitioner suffered as the result of his attorney's conflict of interest. This is the very indulgence which this court refused to make in *Glasser, supra*. Therefore, petitioner urges this court to look to the actual conflict of interest that existed, and not try to guess the amount of prejudice resulting therefrom.

Respectfully submitted,

JAMES A. WADE
799 Main Street
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Counsel for Petitioner

January 25, 1972

SUPREME COURT OF THE UNITED STATES

Syllabus

DUKES *v.* WARDEN, CONNECTICUT STATE PRISON

CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 71-5172. Argued March 21, 1972—Decided May 15, 1972

Petitioner's claim that his guilty plea was not voluntarily and intelligently made because of an alleged conflict of interest on the part of his counsel has no merit, and that alleged conflict of interest is therefore not a reason for vacating his plea. Pp. 2–8.

161 Conn. 337, 288 A. 2d 58, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 71–5172

Charles O. Dukes, Petitioner, *v.* Warden, Connecticut State Prison. | On Writ of Certiorari to the Supreme Court of Connecticut.

[May 15, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

On May 16, 1967, petitioner, on advice of counsel, pleaded guilty in Superior Court of Hartford County, Connecticut, to charges of narcotics violation and larceny of goods. On June 16, 1967, before being sentenced, he informed the court that he had retained new counsel and desired to withdraw his plea and stand trial. The court refused to permit him to withdraw his plea and sentenced him to a term of five to 10 years on the narcotics charge and to a term of two years on the larceny charge. The Connecticut Supreme Court affirmed this conviction on his direct appeal challenging the voluntariness of his plea, *State* v. *Dukes*, 157 Conn. 498, 255 A. 2d 614 (1969), and the United States District Court for the District of Connecticut denied his application for federal habeas corpus relief sought in Civil Action No. 13029. He then brought this state habeas corpus action in the Superior Court for Hartford County, and attacked the voluntariness of his plea under the Federal Constitution on a ground not raised either on his direct appeal or in his action for federal habeas corpus relief. He alleged that a conflict of interest arising from his lawyer's representation of two girls

with whom petitioner had been charged in an unrelated false pretenses case was known to the judge who sentenced him and rendered his plea involuntary and unintelligent. After a full hearing, the Superior Court denied relief. The Supreme Court of Connecticut affirmed, 161 Conn. 337, 288 A. 2d 58 (1971). The Supreme Court stated that, although the petition for state habeas relief alleged that the guilty plea was not voluntary and intelligent on several grounds, "[o]n appeal, however, [petitioner] has asserted in essence only that he was denied the effective assistance of counsel, which rendered his plea involuntary . . . ." 161 Conn., at 339, 288 A. 2d, at 60. We granted certiorari. 404 U. S. 937 (1971).

The two girls were represented by Mr. Zaccagnino of the firm of Zaccagnino, Linardos, and Delaney in the false pretenses case, and petitioner by another lawyer, when petitioner retained the firm to defend him in the narcotics and larceny case. There were also charges pending against petitioner in New Haven and Fairfield counties. He also faced the possibility of prosecution as a second offender, having been convicted in state court in 1961 of breaking and entry and assault.

Petitioner, accompanied by Mr. Zaccagnino, appeared on May 9, 1967, to plead to the narcotics and larceny charges. The lawyer advised him to plead guilty if a plea bargain could be negotiated whereby the State's attorney would consolidate all outstanding charges in and out of Hartford County and agree not to prosecute petitioner as a second offender, but to recommend a sentence of five to 10 years on the narcotics charge, two years on the larceny charge, and concurrent sentences on all the other charges. Under Connecticut General Statutes § 54–17a (Revision of 1958) the New Haven County and Fairfield County charges would be transferred to Hartford County for disposition only if

the State's attorneys of the counties consented and petitioner pleaded guilty to the charges. When petitioner refused to accept this advice, Mr. Zaccagnino asked the court to be relieved as petitioner's counsel. The court denied the request but accepted petitioner's plea of not guilty and continued the trial to the next day so that petitioner might try to retain another lawyer. As petitioner went to the corridor outside the courtroom, however, Hartford police officers arrested him on still another charge. Petitioner attempted suicide at the police station to which he was taken and was hospitalized for several days. Accordingly the trial date was postponed to May 16.

Petitioner did not engage new counsel but appeared for trial on May 16 represented by Mr. Delaney, partner of Mr. Zaccagnino who was engaged in another court. Petitioner now showed interest in a plea bargain, and Mr. Delaney and the State's attorney engaged in negotiations, which were interrupted from time to time while Mr. Delaney consulted with petitioner. A plea bargain on the terms Mr. Zaccagnino had urged petitioner on May 9 to accept was finally struck, and petitioner withdrew his not guilty plea and entered the guilty plea he now attacks. The State's attorney had misgivings because of petitioner's expressed dissatisfaction with Mr. Zaccagnino the week before, and the following occurred:

> "[State's Attorney]: . . . The record also ought to appear that Mr. Delaney is here with him today and he is in the office of Mr. Zaccagnino. I think the Court might inquire with respect to the representation since there had been some indication that counsel had asked to withdraw the other day.
>
> "The Court: Well now, Mr. Dukes, I want to be sure everything is in order here. . . . Now I want,

now Mr. Delaney is here, are you fully satisfied with the services he is rendering you, Mr. Dukes?

"The Accused: Yes sir.

"The Court: You are. And now you know of course, Mr. Dukes, that—you know of course that the State of Connecticut has the burden of proving you guilty on the charge and you are free to go to trial but you still wish to change your plea, is that correct?

"The Accused: Yes, sir.

"The Court: And you do this of your own free will, Mr. Dukes?

"The Accused: Yes, sir.

"The Court: And you know the probable consequences of it?

"The Accused: Yes, sir.

"The Court: Very well, and no one has induced you to do this, influenced you one way or the other? You are doing this of your own free will?

"The Accused: Yes.

"The Court: Very well then. We will accept the change of plea."

The court set June 2, 1967, for sentencing petitioner. But the documents transferring the New Haven County and Fairfield County charges had not arrived, and the presentence report had not been completed, on that day, and the date was therefore continued to June 16, 1967. By coincidence, however, the judge's calendar for June 2 also listed the case of the two girls who, on Mr. Zaccagnino's advice, had pleaded guilty to the false pretenses charges and were to be sentenced. That proceeding did not involve petitioner because the disposition of the charges as to him was part of the plea bargain. In urging leniency for the two girls, Mr. Zaccagnino made statements putting the blame on petitioner for the girls' plight. These statements are the primary basis

of petitioner's claim of divided loyalty on the part of Mr. Zaccagnino which he alleges rendered his guilty plea of May 16 involuntary and unintelligent. Mr. Zaccagnino said:

> ". . . both of them came under the influence of Charles Dukes. Now how they could get in a position to come under the influence of somebody like him, if Your Honor pleases, creates the problem here that I think is the cause of the whole situation.
>
> "Both these girls left their homes, came under the influence of Dukes and got involved. I think, Your Honor, though, that the one thing . . . that should stand in their good stead, as a result of their willingness to cooperate with the State police they capitulated Dukes into making a plea. I think, Your Honor, since I was on both sides of the case, having been on the other side on the other case I can tell Your Honor that it was these girls because of their refusal . . . to cooperate with Dukes and to testify against him that capitulated him into taking a plea on which he will shortly be removed from society . . . ."

Mr. Zaccagnino appeared on June 16 to represent petitioner in the proceedings to complete the plea bargain. He was surprised to be told by petitioner that petitioner had obtained new counsel and intended to withdraw his guilty plea and stand trial. It appears from petitioner's cross-examination at the state habeas hearing that he had learned on June 2 of Mr. Zaccagnino's statements about him when the girls were sentenced.[1] Yet he did

[1] "Q. . . . On June 2nd, weren't you in Court with Mr. Zaccagnino when your case had to be postponed . . . ?

. . . . . .

"A. I'm trying to think of the day that the girls got sentenced, because I was not in Court the day they got sentenced, because I

not tell Mr. Zaccagnino that this was why he was changing lawyers, nor did he tell the court that this was why he wanted to withdraw his plea. When pressed by the court to give a reason, he answered, "At the time I pleaded, I just came out of the hospital, I think it was a day, and I was unconscious for three days, and I didn't realize at the time actually what I was pleading to." [2] His explanation for wanting another lawyer was that he thought an out-of-town lawyer would give him better service: "I would rather have an attorney out of town for certain reasons of the case." The court refused to permit petitioner to withdraw the plea and heard counsel on the question of the sentence to be imposed. The State's attorney, despite the collapse of the plea bargain, recommended, and the court imposed, a first offender's sentence of five to 10 years on the narcotics count and two years on the larceny count, that is, the precise sentence the State's attorney had agreed to recommend as part of the plea bargain. Mr. Zaccagnino, however, was concerned that petitioner's unwillingness to go through with the plea bargain left petitioner vulnerable to the prosecution on the outstanding charges in the various counties: ". . . it was a matter that Your Honor would normally . . . , in a situation like this, enter concurrent sentences, if, in fact, it was so recommended by the State's Attorney; but since

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know that I wasn't in Court that specific day, *because that's when I was told what was said about me,* and so forth and so on, in Court, so I'm quite sure I wasn't in Court that day." App. to Petitioner's Brief, at 162–163 (emphasis supplied).

[2] The state habeas court took evidence on the question whether his plea was involuntary as the product of the after-effects of his suicide attempt and found against petitioner. Petitioner has not sought review on this question. The only issue before us is his claim that the alleged conflict of interest rendered the plea involuntary and unintelligent.

[petitioner] doesn't want to plea to these other matters, I would like to make that note for the record, because I feel at some later date he may have to come back to this court and see Your Honor or see another judge on these other matters now pending before it." [3]

On this state of facts, the Connecticut Supreme Court concluded that petitioner had not sustained his claim that a conflict of interest on the part of Mr. Zaccagnino rendered his plea involuntary and unintelligent. The court said, 161 Conn., at 344–345, 288 A. 2d, at 62:

> "There is nothing in the record before us which would indicate that the alleged conflict resulted in ineffective assistance of counsel and did in fact render the plea in question involuntary and unintelligent. [Petitioner] does not claim, and it is nowhere indicated in the finding, nor could it be inferred from the finding, that either Attorney Zaccagnino or Attorney Delaney induced [petitioner] to plead guilty in furtherance of a plan to obtain more favorable consideration from the court for other clients. . . . Neither does the finding in any way disclose, nor is it claimed, that [petitioner] received misleading advice from Attorney Zaccagnino or Attorney Delaney which led him to plead guilty. . . . Moreover, the trial court specifically found that when [petitioner] engaged Zaccagnino as his counsel, he knew that Zaccagnino was representing two defendants in the unrelated case in which he was a codefendant, that he never complained to the court that he was not satisfied with Attorney Zac-

[3] As events proved, all other charges pending in the various counties were dismissed, although after the decision of the Connecticut Supreme Court affirming petitioner's conviction on direct appeal. Petitioner thus received the benefits of the plea bargain without paying the cost of pleading guilty to the other offenses.

> cagnino because of this dual representation, that he was not represented at the entry of his plea by Attorney Zaccagnino, that he was represented by Attorney Delaney at the entry of the plea, that he had a lengthy conversation with Attorney Delaney prior to entering his plea which he recalled completely, and that on specific inquiry by the court before he pleaded guilty, he told the court that he was satisfied with the representation by Attorney Delaney. The court did not err in concluding that [petitioner's] plea was not rendered involuntary and unintelligent by the alleged conflict of interest."

We fully agree with this reasoning and conclusion of the Connecticut Supreme Court. Since there is thus no merit in petitioner's sole contention in this proceeding—that Mr. Zaccagnino's alleged conflict of interest affected his plea—that conflict of interest is not "a reason for vacating his plea." *Santobello* v. *New York*, 404 U. S. 257, 267 (1971) (MARSHALL, J., concurring in part and dissenting in part).

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 71–5172

Charles O. Dukes, Petitioner, *v.* Warden, Connecticut State Prison. | On Writ of Certiorari to the Supreme Court of Connecticut.

[May 15, 1972]

MR. JUSTICE STEWART, concurring.

In *Santobello* v. *New York*, 404 U. S. 257, 267, I joined MR. JUSTICE MARSHALL'S concurring opinion because I agree that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment." *Id.*, at 267–268.

If a defendant moves to withdraw a guilty plea before judgment and if he states a reason for doing so, I think that he need not shoulder a further burden of proving the "merit" of his reason at that time. Before judgment, the courts should show solicitude for a defendant who wishes to undo a waiver of all the constitutional rights that surround the right to trial—perhaps the most devastating waiver possible under our Constitution. Any requirement that a defendant prove the "merit" of his reason for undoing this waiver would confuse the obvious difference between the withdrawal of a guilty plea before the government has relied on the plea to its disadvantage, and a later challenge to such a plea, on appeal or collaterally, when the judgment is final and the government clearly has relied on the plea.

But I do not believe that these problems are presented in this case. Certiorari was granted to consider the peti-

tioner's contention that his plea was made involuntarily and unintelligently because of his lawyer's alleged conflict-of-interest. This conflict-of-interest claim was not raised until a habeas corpus proceeding, years after judgment had been pronounced. The petitioner does not now challenge the refusal of the trial court to permit him to withdraw his guilty plea *before* judgment. Rather, he challenges a later refusal by the trial court to vacate his plea on a motion made well *after* judgment and sentence, presenting a claim not previously raised.

Thus I agree with the Court that the petitioner's claim should be evaluated under the standards governing an attack on a guilty plea made after judgment, not under the far different standards governing a motion to withdraw a plea made before judgment has been pronounced. I also agree with the Court that, evaluated under the former standards, the petitioner's claim of involuntariness attributable to his counsel's conflict-of-interest lacks merit.

It is on this understanding that I join the opinion and judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 71-5172

Charles O. Dukes, Petitioner, *v.* Warden, Connecticut State Prison. | On Writ of Certiorari to the Supreme Court of Connecticut.

[May 15, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I dissent. Before sentencing, petitioner stated that he was innocent, and sought to vacate his guilty plea so that he could proceed to trial with new counsel in whom he had confidence. He claims, with ample support in the record, that he was advised to plead guilty—and indeed pressured to do so—by lawyers who did not devotedly represent his interests. I agree with petitioner that he should have been permitted to withdraw his guilty plea.

I

Petitioner, Charles Dukes, was arrested on March 14, 1967, and charged by Hartford, Connecticut, authorities with a violation of the Uniform State Narcotic Drug Act and with receiving stolen goods. From the beginning, there was a sharp conflict between petitioner and his lawyers over whether he should plead guilty. Two partners from the law firm that petitioner retained, each of whom handled the case on different occasions, tried to convince petitioner to plead guilty to both charges. They argued that because there were several other outstanding charges against him, petitioner's best hope was to secure an agreement to consolidate all the charges for disposition together, so that he could receive reason-

able concurrent sentences. But petitioner maintained that he was innocent and would not agree to plead guilty. App. 39, 112, 119–120.

Although petitioner had not yet pled to either of the charges, the narcotics case was called for trial on May 9, 1967. The conflict between lawyer and client surfaced dramatically when petitioner's attorney immediately sought to withdraw from the case "because there happens to be a slight conflict between my client and myself, and it's not financial, Your Honor, it is one basically that goes to the heart of my representing him . . . ." Noting his view that an advocate "must believe in the cause" of his client, the lawyer went on to reiterate that the disagreement might "prejudice the defendant." He reported that petitioner "either wants to represent himself or get counsel outside of the county that he can have more confidence in for some reason or other." (App. 9, 10, 17.) The majority concedes that this announced "conflict" was over the lawyer's insistence on pleading the client guilty. Then petitioner himself addressed the court to explain that "with local counsel I am afraid, well, I know there is going to be resentment. I have reasons to believe that through conversations, and I'd like the opportunity to hire an attorney from another state that don't [*sic*] have no knowledge of the case. . . . Otherwise . . . I intend to try my own case." (App. 18.) Petitioner's lawyer spoke again, concluding with the judgment that he, for one, could not "do this man justice in this particular case." (App. 19–20.) But the court denied counsel's motion to withdraw "at this time." Petitioner then pled not guilty, and trial was scheduled for the following morning.

Proceedings did not actually resume until a week later, on May 16.[1] After conversations in the courthouse that

[1] The record discloses that on May 10 the case was continued until May 16 for trial. On May 9, as petitioner left the courtroom,

morning (App. 131–132), Dukes agreed to follow the advice of his lawyers, who admittedly had been applying "pressure" on him (App. 112, 140): he pled guilty to both the narcotics charge and the larceny-receiving charge. Prior to entry of the pleas, the judge asked petitioner whether he was "fully satisfied with the services [your lawyer] is rendering you . . . ." App. 24, 41. Petitioner said that he was. But this satisfaction, such as it was, was short lived.

On June 16, 1967, petitioner appeared for sentencing. His lawyer immediately informed the court that petitioner wished to withdraw his plea and had secured other counsel, from New Haven. Noting the lateness of these developments, petitioner's lawyer conceded that "I had a suspicion . . . that this [might] take place because of the problem when he entered the plea. I was maybe a little forceful." And although he disputed petitioner's claim that his present lawyers did not "properly represent him," counsel once again informed the court that petitioner "doesn't have any confidence in me." App. 28, 31. Petitioner himself told the court about his difficulty in getting a lawyer that would, he thought, do him justice. He also explained that when he pled guilty he was still recuperating from his recent suicide attempt, see n. 1, *ante*, and "didn't realize at the time actually what I was pleading to." App. 32. See n. 8, *post*. Thus, contrary to the majority's description, petitioner, through his lawyer and in his own voice, gave several specific reasons for wanting to withdraw his plea.

Following the prosecutor's statement opposing petitioner's request, and without any further inquiry, the judge refused to let petitioner withdraw the guilty plea.

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he was arrested by Hartford police on other charges. Petitioner attempted suicide while in police custody, and was hospitalized for several days.

When the judge asked Dukes what he wished to say before being sentenced, Dukes replied: "I'm rather flabbergasted really, because I didn't expect this this morning. It just puzzles me. I am not guilty of the charges. I am not guilty." App. 33.[2] Petitioner was sentenced to five to 10 years on the narcotics count and two years on receiving stolen property count, as the prosecutor had recommended. The alleged reason for the plea—to gain consolidation of all outstanding charges against petitioner, and thereby secure concurrent sentences on the pending charges—was never fulfilled. On the day of sentencing, petitioner refused to plead guilty to any charges, and consolidation was impossible. App. 30–33, 157.

As just noted, the sentencing judge did not inquire into the facts surrounding either petitioner's legal representation or his plea. But these facts were developed at a state habeas corpus hearing,[3] and petitioner's lack of confidence in his lawyer finds striking support in the hearing record.

That record details the sharp conflict between lawyer and client over the decision to plead guilty. But, more significantly, it reveals that the lawyer who advised petitioner to plead guilty had a gross conflict of interest. Ancillary to the instant proceedings, petitioner's lawyer

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[2] The New Haven attorney was not in the courtroom, although he had telephoned the prosecutor that morning from out of town. Petitioner apparently expected his new lawyer to be present in the courtroom and to "take over" after the guilty plea was withdrawn. App. 150–151. That lawyer did represent petitioner on his direct appeal to the Supreme Court of Connecticut. 255 A. 2d 614, 157 Conn. 498 (1969).

[3] I express no view on the subject of whether further evidentiary development might be appropriate were petitioner to pursue this case on federal habeas corpus. See nn. 4 and 7, *post*. Given the way I view this case, enough is present in the record to indicate petitioner's position.

was representing two young women charged with conspiracy to obtain money by false pretenses. Petitioner was a codefendant in this second case, and was represented by another attorney. This second prosecution was unrelated to the matter now before our Court. The two young women pled guilty to the false pretenses charges on April 18, 1967, and on June 2, 1967, appeared for sentencing. The sentencing judge was the same judge who was to sentence petitioner two weeks later.

In his remarks to the judge on behalf of the two women, the lawyer told the court that these women had come "under the influence of Charles Dukes," who had led them astray. He pointed out that their cooperation with the state police had "led to the downfall of Dukes" and "capitulated [Dukes] into taking a plea [of guilty] on which he will shortly be removed from society." [4] He placed on Dukes the blame for the offenses

[4] It is not clear from the lawyer's words whether he meant that Dukes had been "capitulated" into pleading guilty to the offense allegedly committed with the two women. At the habeas hearing, the lawyer testified that he did not remember Dukes' ever taking a plea in that case. App. 122. There is a strong basis for thinking that the laywer was in fact referring to the guilty plea entered in our case. At the women's sentencing, he specifically stated that "since I was on both sides of the case, *having been on the other side in the other case* I can tell Your Honor that it was these girls that . . . capitulated [Dukes] into taking a plea . . ." App. 68 (emphasis added). However, the court below found that all the "remarks by [the attorney] concerning the plaintiff had only to do with the relationship of the plaintiff and the two girls in that particular case where all three of them were codefendants, and in no way referred to the instant case for which he was later to be sentenced." 161 Conn. 337. Nevertheless, certified court records sent to our Court make clear that Dukes *never pled guilty to the offense involving the women*, and that charges were *nolled* in February 1970. A direct connection between the false pretenses case and our case is apparently conceded by today's majority when it notes that the plea bargain in our case included a deal in which

committed by the women, saying that he was "the most culpable since he had all the instruments with which to dupe the girls." App. 43–44, 68–71.[5] The two women were then sentenced to short prison terms.

In short, to secure lighter sentences for one set of clients, the lawyer denigrated another of his clients who was to appear before the same judge for sentencing in two weeks. Even absent any showing that the lawyer's "pressure" on petitioner to plead guilty was improperly motivated, the gross conflict of interest obvious from counsel's remarks lends strong support to petitioner's presentence claim that he was not receiving devoted representation from his attorney.

II

I would permit petitioner to withdraw his guilty plea. As JUSTICE DOUGLAS has recently reminded us,

> "However important plea bargaining may be in the administration of criminal justice, our opinions have

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petitioner would plead guilty to the false pretenses charge. See Op. p. 4. Obviously, if counsel was in fact reporting the women's role in "capitulating" Dukes to plead guilty in our case, his own conflict of interest would be even more pernicious than that now clear from the record.

[5] The court below observed that these "improper remarks made by counsel on June 2, 1967, were a repetition of what had already been told to the court in substance by the state's attorney." 161 Conn. 337, 347. (The court made a similar observation about the presentence report, which is not in our record.) This, of course, is irrelevant to the question of whether petitioner was represented by an attorney loyal to his interests. But, in any event, it is incorrect to say that counsel's remarks merely repeated the statements of the prosecutor. The prosecutor simply reported that the two women "became associated with one Charles Dukes . . . Charles Dukes had paraphernalia with respect to checks and money orders and they agreed to cash these checks with false credentials furnished by him." (App. 65.) This is a far cry from the vivid

> established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental right to a jury trial, *Duncan* v. *Louisiana,* 391 U. S. 145, to confront one's accusers, *Pointer* v. *Texas,* 380 U. S. 400, to present witnesses in one's defense, *Washington* v. *Texas,* 388 U. S. 14, to remain silent, *Malloy* v. *Hogan,* 378 U. S. 1, and to be convicted of proof beyond all reasonable doubt, *In re Winship,* 397 U. S. 358." *Santobello* v. *New York,* 404 U. S. 257, 264 (1971) (concurring opinion).

See *Boykin* v. *Alabama,* 395 U. S. 238, 245 (1969). The precondition for all these rights is the constitutional "right not to plead guilty." *United States* v. *Jackson,* 390 U. S. 570, 581 (1968). A defendant may waive his constitutional rights through a guilty plea, but such waivers are not quickly presumed, and, in fact, are viewed with the "utmost solicitude." *Boykin* v. *Alabama, supra,* at 243. Our decisions, constitutional and statutory, have all recognized that, consistent with the requirements of law enforcement, adequate safeguards can and should exist to give meaning to the right not to plead guilty. *E. g., Santobello* v. *New York,* 404 U. S. 257 (1971); *Brady* v. *United States,* 397 U. S. 742, 748 (1970); *Boykin* v. *Alabama,* 395 U. S. 238 (1969); *McCarthy* v. *United States,* 394 U. S. 459 (1969); *White* v. *Maryland,* 373 U. S. 59 (1963); *Machibroda* v. *United States,* 368 U. S. 487 (1962); *Walker* v. *Johnston,* 312 U. S. 275 (1941); *Kercheval* v. *United States,* 274 U. S. 220 (1927).

I would not view a guilty plea as an irrevocable waiver of a defendant's federal constitutional right to a full

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and pointedly argumentative remarks of the women's (and petitioner's) lawyer.

trial, even where the plea is, strictly speaking, "voluntarily" entered. I adhere to the view that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment." *Santobello* v. *New York, supra,* at 267–268 (opinion of MARSHALL, J., concurring in part and dissenting in part, with whom BRENNAN, J., and STEWART, J., joined).

Such a rule is a sensible part of the constitutional law of waiver. We view guilty pleas with the "utmost solicitude" because they involve the simultaneous waiver of so many constitutional rights; our system of law favors the assertion of constitutional rights, not their waiver. It is inconsistent with that basic viewpoint for guilty pleas to be irrevocable even before sentencing. Usually because of new information or new insights, defendants may have "sober second thoughts" about their pleas. Where the sentencing itself is postponed beyond the day of pleading, the door should not be slammed shut to formal reconsideration of the decision to plead guilty. A guilty plea is not a trap. Ordinarily, a defendant who changes his mind for sufficient reason and in timely fashion should not be deemed to have waived his right to a full trial. In short, absent the government's showing specific and substantial harm, I would generally permit withdrawal of the plea before sentencing.

Such a rule would not compromise the government's interests. "[I]n the ordinary case where a motion to vacate is made prior to sentencing, the government has taken no action in reliance on the previously entered guilty plea and would suffer no harm from the plea's withdrawal." *Santobello* v. *New York, supra,* at 268

(opinion of MARSHALL, J., concurring in part and dissenting in part, with whom BRENNAN, J., and STEWART, J., joined). The defendant seeks only the basic opportunity to contest the original charges against him. A full trial could be promptly held, and, since the period between plea and sentencing is usually short, there will have been no substantial delay. Where the government *can* show specific and substantial harm, the defendant may be held to his plea. But, ordinarily, the government can claim only disappointed expectations. In such a case, the balance of interests must favor vindication of the individual's most basic constitutional rights.

In the instant case, petitioner tendered a specific reason for vacating his guilty plea. Protesting his innocence, he claimed that he was not getting satisfactory legal representation and had retained new counsel. The record as already made by June 16, 1967, showed an admitted and longstanding conflict between lawyer and client over the course of the litigation. Properly advised by loyal counsel, the defendant himself, of course, must have the ultimate decision about pleading guilty. The lawyer admitted that he had been "a little forceful" in urging petitioner to plead guilty. Given all these things, petitioner, in my view, had ample justification for rescinding the plea before sentencing.

But we need not be limited to the bare record already made by June 16, 1967. The trial judge then did not even minimally inquire into the facts behind petitioner's rather inarticulate claims. He should have done so, rather than quickly and simply deny the motion to vacate the plea. It was not until the state habeas action that the facts surrounding petitioner's representation were developed. As this subsequent record shows, petitioner's fears that he was not getting devoted represenation had strong objective basis. (It is of course irrelevant that the evidence of a clear conflict of interest may

have exceeded even petitioner's earlier fears of inadequate representation.)[6] As the court below concluded,

> "Obviously, the derogatory remarks by [the attorney] on behalf of his clients in one case about a client whom he is representing in another case were highly improper. 'When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion.'" 161 Conn. 337, 345–346 (1971).

This finding of "improper" conduct gives graphic support to petitioner's presentence claim that his lawyers were not properly representing his interests, the main reason petitioner gave for wanting to withdraw his plea.

There is no need to decide whether this conflict of interest deprived petitioner of his Fourteenth Amendment right to counsel, or functioned to make his guilty plea "involuntary." It is sufficient to conclude here that, before sentencing, petitioner's plausible dissatisfaction with counsel constituted a sufficient reason for with-

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[6] The majority suggests that on June 16 petitioner knew about his lawyer's remarks at the women's sentencing, but didn't tell the court. Op. 5. The majority gives us no clue why petitioner would possibly want to withhold this information, if known. Rather, its factual conclusion rests on a single phrase in petitioner's habeas corpus testimony, and burdens this rather inarticulate petitioner with the linguistic precision of Justices of this Court. Read in context and with what I think is more common sense, petitioner's awkward phrasing clearly refers to the day "when" the lawyer's remarks were made, not when petitioner was subsequently "told" about them. I think it apparent that when petitioner sought to vacate his plea on June 16, he did not know about his lawyer's particular act of betrayal on June 2. What *is* clear, however, is that the judge who sentenced Dukes *was* fully aware of the lawyer's remarks, having heard them two weeks earlier before sentencing the women.

drawing his guilty plea.[7] The majority appears to equate the questions, suggesting by its analysis that if the plea was neither involuntary nor secured and "affected" by unconstitutionally ineffective counsel, it may not be vacated. But this is to equate the situations before and after sentencing. I think we are required to apply a much less rigorous standard before sentencing. The point in this case is that (1) petitioner sought to vacate his plea before sentencing because he questioned the representation he was receiving, and that (2) petitioner's conclusions, on this record, were plausible, to say the least. This, it seems to me is enough to permit withdrawal of the plea before sentencing. The majority totally ignores the fact that the record demonstrates a long-standing conflict between lawyer and client, that the lawyer himself admitted being forceful in securing the plea, and that the lawyer engaged in what the court below found to be "highly improper" conduct at conflict with the loyalty a client rightfully expects from his lawyer. As if he did not understand whose choice it is to go to trial, petitioner's own lawyer gave this extraordinary account of his relationship with petitioner, who throughout protested his innocence:

> "[Dukes] claimed consistently to me that he didn't make any sale of narcotics, and so I told him what I thought about the case, after reviewing the evi-

[7] The majority intimates that we are restricted to deciding this case on a "voluntariness" theory. It is true that, since precedent suggested that petitioner's only possible line of constitutional attack was to challenge the "voluntariness" of his plea, his papers have focussed on this approach, although not exclusively. See Pet. Brief, pp. 16, 19, 22. But we are not restricted to the precise formulation petitioner has favored. At all relevant times in this action, petitioner claimed that he should have been permitted to withdraw his guilty plea before sentencing because his lawyer was not rendering satisfactory representation. *Ibid.* This is the claim, raised here and below, which I reach and decide.

dence. So from the beginning, Dukes wanted a trial, and I probably thought I might have been too forceful, but it sometimes happens that your judgment, you're trying to impose upon a client, knowing that it's in his best interest, at least in your opinion it is, and I told Charlie it would be winning the battle and clearing the way, because there was no way, with these five felony warrants pending against him, that I was able to win them all, because I said no matter what you think about this case, it's my opinion that it's your best interest to plead guilty, and at no time did I have a conversation whether he was guilty or not. Mr. Delaney handled that at the time of the change of plea, but I know when I talked to him, he maintained he was innocent. At some later date he changed his plea, so I assume there was some conversation about that, and I don't know what took place in the meantime, but basically, there was the reason that I made that statement to the Court, because he was insistent that he wanted to try the case, and I kept trying to get the matter put down, because I didn't think it was in his best interest to try it." App. 120.

Of course, on my view, it is of no real significance that on the day of the guilty plea petitioner expressed satisfaction with counsel. Where the loyalties of counsel are questioned even after the plea is entered, a defendant undercuts the premise of his prior guilty plea and the waiver of rights that plea entailed. Surely the same is true where, as here, the defendant specifically asserts his innocence after pleading.[8]

[8] Petitioner also claimed that on the day of the plea he was in a weakened physical state because of his recent hospitalization and

When a defendant gives a reason for withdrawing his plea before sentencing, and the reason is a good one, he should be allowed to withdraw the plea and regain his right to a trial. Here, petitioner's reason was conflict of interest of his lawyer. A part of this conflict was his lawyer's insistence that he plead guilty and petitioner's insistence that he was innocent. This is certainly a conflict. No wonder the last words of petitioner before sentencing were:

> "I'm rather flabbergasted really, because I didn't expect this this morning. It just puzzles me. I am not guilty of the charges. I am not guilty."

The State in our case has never claimed that it would suffer any harm beyond disappointed expectations about the plea itself.[9] Where the defendant has presented

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in a confused state of mind. This claim was explored at the state habeas hearing, where petitioner also testified that when he pled guilty he thought that the plea was merely "temporary." (App. 149–150, 154.) Although the habeas court found that petitioner's plea was "voluntarily and intelligently made," App. 46, petitioner had clearly gone through a trying week before the plea. See n. 1, *ante*. In my view, the uncontradicted facts about his recent hospitalization, App. 40, would themselves entitle petitioner to a "sober second thought," and to withdraw his plea before sentencing.

[9] Ours is not a case in which, prior to the defendant's motion to vacate his plea, the government had performed its part of a plea bargain and could not be restored to the status *ante*. Since petitioner had pled guilty to the original charges filed against him, no counts had been irrevocably dismissed prior to petitioner's motion to vacate. When, on the day of sentencing, petitioner refused to plead guilty to pending charges in other cases, he could not receive the benefits of an agreement concerning those pending charges; but the government was not thereby hurt. See p. 4, *ante*. Obviously, where the government has simply agreed to recommend a specific sentence, withdrawal of the plea before sentencing would not compromise the government's position.

a plausible reason for withdrawing his plea, this mere disappointment cannot bar him from regaining his constitutional rights before sentencing.

I would remand the case with instructions that the plea be vacated and petitioner given an opportunity to replead to the charges in the information.

No. 71-5172

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